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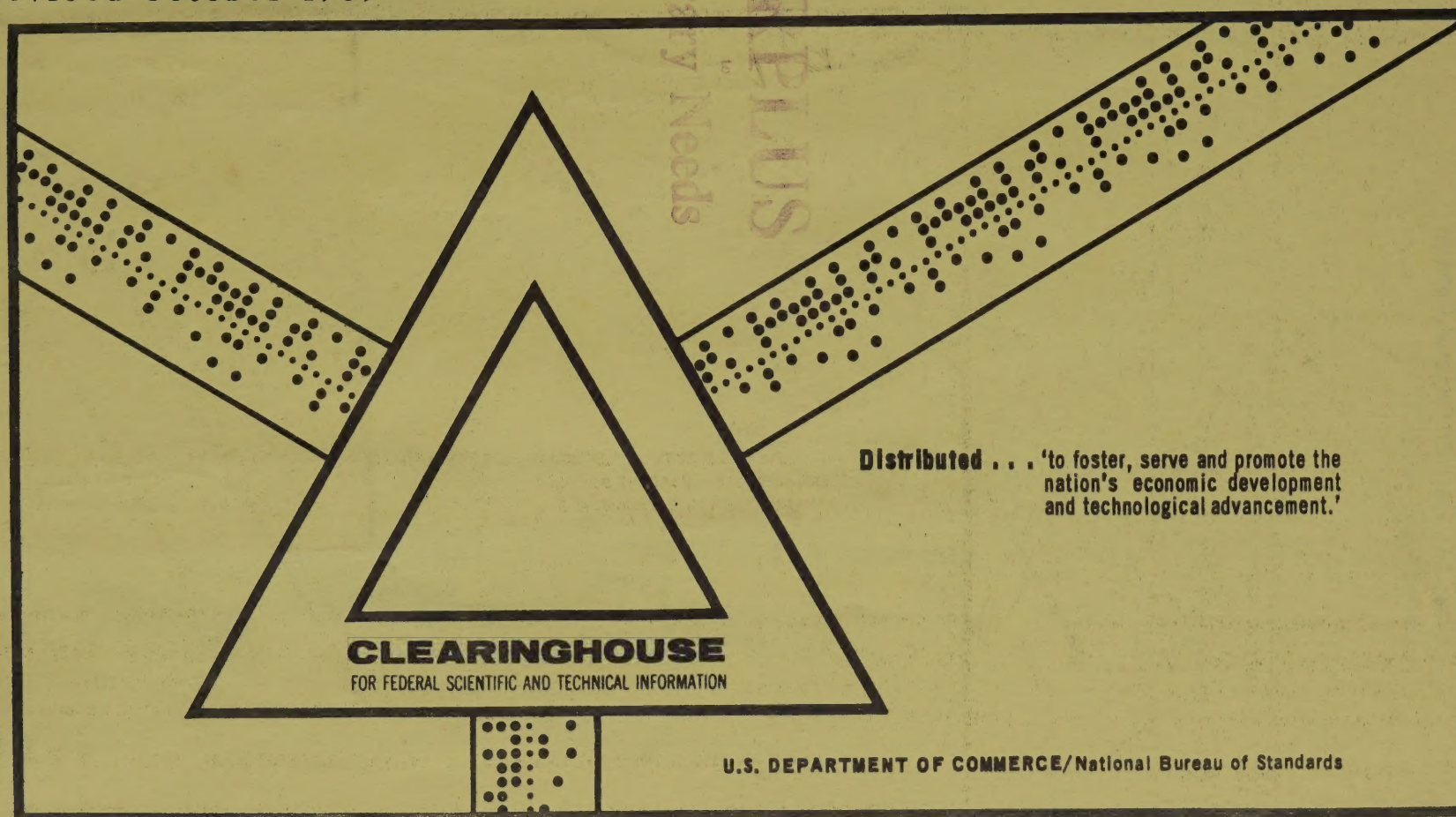
FEDERAL PUBLIC LAND LAWS AND POLICIES RELATING TO
INTENSIVE AGRICULTURE

VOLUME I (Legal Study)

Kronick, Moskovitz, Tiedemann and Girard

Revised October 1969

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LEGAL STUDY OF
FEDERAL PUBLIC LAND LAWS AND POLICIES
RELATING TO INTENSIVE AGRICULTURE

Prepared for the
PUBLIC LAND LAW REVIEW COMMISSION

APRIL 1969

REVISED OCTOBER 1969

Kronick, Moskovitz, Tiedemann
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PUBLIC LAND LAW REVIEW COMMISSION

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Prepared under contract with the
Public Land Law Review Commission.

The opinions, findings, conclusions
and data expressed in this publication are
those of the authors and not necessarily
those of the Public Land Law Review
Commission.

This publication constitutes only
one of a number of sources of information
utilized by the Commission in the conduct
of its public land study program.

* * * * *

NOTE TO THE READER: As originally submitted by the
contractors this report consisted of a legal study,
published in one volume and a resource study pub-
lished in seven volumes. As republished by
Clearinghouse the study has been combined into four
volumes. Volume I consists of the legal study,
Volume II contains the resource portion of the study
and Volumes III and IV contain the working papers
and appendices to the resources study.

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FOREWORD

This manuscript is one of a series prepared for the Public Land Law Review Commission to provide data for the Commission's use in forming a basis for recommending future public land policies to Congress and the President of the United States.

As pointed out elsewhere, these reports represent the views of their authors and are not necessarily those of the Commission. They are only one of a number of information sources used by the Commission.

In establishing the Public Land Law Review Commission in September 1964, Congress declared the following policy: That the public lands of the United States shall be (a) retained and managed or (b) disposed of, all in a manner to provide the maximum benefit for the general public. It also directed that a comprehensive review be made of the public land laws and the related administrative rules and regulations to determine whether and to what extent revisions are necessary to accomplish the stated policy objective.

Considerable evidence pointed to the need for such a review. Dating back in some cases to the birth of the nation, our public land laws have developed over a long period of years through a series of Acts of Congress which are not fully correlated with each other. Administration of the public lands and the related laws has been divided among several agencies of the Federal Government. Quite possibly, these laws and the manner in which they are administered may be inconsistent with one another and inadequate to meet the current and future needs of the American people.

The Commission was instructed to:

1. Study existing statutes and regulations governing the retention, management, and disposition of the public lands;

2. Review the policies and practices of the Federal agencies charged with administrative jurisdiction over such lands insofar as such policies and practices relate to the retention, management, and disposition of those lands;
3. Compile data necessary to understand and determine the various demands on the public lands which now exist within the foreseeable future; and
4. Recommend such modifications in existing laws, regulations, policies and practices as will, in the judgment of the Commission, best serve to carry out the policy objective.

To fulfill these requirements, the staff was charged with the responsibility of performing or having performed the appropriate research and to then present to the Commission all the information and data necessary as a foundation for the Commission's deliberations, conclusions, and recommendations. A study program encompassing various subject areas was undertaken and separate manuscripts have been or are being prepared covering each of 33 separate topics.

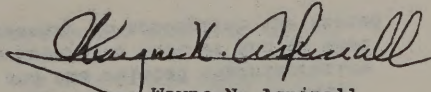
In fulfillment of a policy of maintaining the smallest technical and professional staff possible, most of the studies are being accomplished under contract with individuals, institutions such as universities, and research organizations; a few of the studies and analyses are being accomplished inhouse by the Commission staff, some with consultant assistance.

Thus, while it is still our purpose to review the whole body of public land laws at one time, each study has been designed to examine only a portion of the public lands complex and should be utilized with this understanding. There is, therefore, an interrelationship among the studies and the resultant manuscripts that will require review and examination of more than one report in order to obtain a

complete view of any one aspect of public land law and administration.

Each manuscript has been transmitted from the staff with a letter which discusses the content of the report and sets forth the policy matters to be considered with respect to the particular subject. A copy of the letter of transmittal for this report has been made a part of this volume in order to assist in the understanding of the approach.

These manuscripts have already served an extremely useful purpose in providing a common base for discussion in the Commission and between the Commission and its Advisory Council and the representatives of the 50 governors. We believe that they will also be valuable as reference works, not only on Federal public land matters but concerning all of our natural resources, for use by all levels of government -- Federal, state, and local -- and the academic community as well as all those who are interested in the tremendous natural resources that we, as a nation, possess.


Wayne N. Aspinall
Chairman

Public Land Law Review Commission

1730 K STREET, N.W.
WASHINGTON, D. C. 20006

October 15, 1969

Honorable Wayne N. Aspinall
Chairman
Public Land Law Review Commission
Washington, D. C.

Dear Mr. Chairman:

Transmitted herewith is a two-part study of Federal Public Land Laws and Policies Relating to Intensive Agriculture. The legal portion of this study, so titled, was prepared under contract by the law firm of Kronick, Moskovitz, Tiedemann & Girard of Sacramento, California. The resource portion was prepared under contract by the Department of Economics of South Dakota State University.

The contractors' report was originally submitted to you with our letters of April 30 and June 2, 1969. After you made copies available to the members of the Commission and the Advisory Council and Governors' Representatives, the manuscripts were reviewed and comments were received from the two latter groups. In addition, our staff has reviewed the manuscripts. The contractors were then furnished with all the comments so that inaccuracies could be corrected. ^{1/} However, since this is their report and not that of our commentators, we have not requested any changes based on interpretations or opinions unless the contractor agreed with those interpretations or opinions.

As originally submitted by the contractors this report consisted of a legal study, published in one volume and a resource study published in seven volumes. As republished by Clearinghouse the study has been combined into four volumes. Volume I consists of the legal study, Volume II contains the resource portion of the study and Volumes III and IV contain the working papers and appendices to the resources study.

^{1/} The comments referred to are part of the official files of the Commission. When the Commission ceases to exist, these files will be deposited with the National Archives, Washington, D. C.

Together, the legal and resource portions constitute a study designed to provide the Commission with a comprehensive understanding of the existing laws, policies, practices and problems relating to agricultural use of Federal public lands, the effects of the present system, and possible alternatives to it.

Included in the legal portion of this report is a description of the existing Federal statutory and regulatory systems for disposing and leasing of public lands for agricultural purposes. Judicial and administrative decisions interpreting these systems have been analyzed and described. For purposes of comparison, the study includes a brief description of the systems of selected states for the disposal of lands for agricultural purposes. Also included is a listing and discussion of possible alternatives to and modifications of the existing Federal systems.

To provide the resource background, there is presented information on what has actually happened under the various laws and attendant policies through which Federal public lands are made available for disposal for intensive agriculture. These include, most importantly, the original and enlarged Homestead Acts, the Desert Land Act, and the Reclamation Homestead Act. The contractors also analyzed the leasing of Federal lands for intensive agriculture.

Considerable effort was devoted to the study of problems associated with transferring Federal public lands to private ownership under the Homestead and Desert Land Acts in recent years.

The resource contractor has brought together in a single place for the first time estimates of Federal public lands suitable for intensive agriculture. These estimates are divided into lands suitable for dry land farming, lands suited for irrigated agriculture for which water is presently available, and lands suited for irrigated agriculture for which water is not presently legally or physically available.

Then, existing and potential demand for agricultural products, both domestic and international, are related to the potential output of agricultural products from Federal public lands. The effect of existing price support and land retirement programs is considered.

The changing nature of labor and capital requirements in modern agriculture, the optimum size of farms, and the impact on local communities of bringing new lands into agricultural production are all examined in some detail in the study. Consideration is also given to expenditures necessary to make water available for irrigating public lands, and to acreage restrictions in the public land laws.

The report shows that many of the lands transferred in recent years under the existing public land agricultural settlement laws are in fact highly valuable for agricultural purposes. However, limits on the amount of available water under state water laws have sharply restricted the total area that can be put into agriculture. Other nonprice restrictions, such as those dealing with corporate or other combinations of ownership, also limit this area. Establishing a price for transfer of public lands for agricultural purposes is also noted as a difficult policy problem. These basic policy considerations have emerged from our review of this subject:

1. What objectives, if any, justify a policy of intensive agricultural use of Federal public lands?
 - a. Should Federal lands be allocated to intensive agricultural use if this use is higher valued than existing uses and thus would tend to maximize the rate of economic growth?
 - b. Should Federal public lands be made available for intensive agricultural use in order to stimulate the growth of local and regional economies?
 - c. Is agricultural commodity production from Federal public lands necessary to meet the demand for agricultural products?
 - d. Should Federal lands be made available for intensive agricultural use in order to stimulate urban to rural migration?

2. Under what terms and conditions should Federal public lands be made available for intensive agricultural use?

a. Should transfers of Federal lands to private ownership or use be made at market prices?

(1) Are below market prices for land justified by objectives of regional growth or economic efficiency?

(2) Should any Federal lands allocated to intensive agricultural use be subject to existing subsidy programs, such as price supports or land retirement programs?

b. Are there specific conditions in which leaseholds rather than freeholds should be used?

(1) Should Federal lands suitable for dry-land farming be made available through leaseholds rather than freeholds?

(2) Should agricultural leaseholds be permitted on Federal lands held primarily for other national purposes?

(3) Should lands acquired under the Bankhead-Jones Act be treated the same as public domain lands for purposes of intensive agricultural use?

c. What procedures should be established for determining the specific Federal lands that are suitable for and should be allocated to intensive agriculture?

(1) Should the determination of Federal lands suitable for intensive agriculture be made by state agencies in the state in which the lands occur?

(2) Should state governments certify potential agricultural use of Federal lands according to the availability of state water rights?

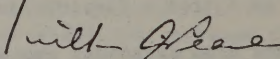
(3) Should state and/or local governments certify potential agricultural use of Federal lands according to their economic development plans and zoning regulations?

(4) Is there any need to guard against speculation in Federal lands by policing against nonagricultural uses of Federal lands after transfer to private ownership?

d. Should the amount of land transferred from Federal ownership to a single owner for intensive agricultural use be subject to acreage restrictions?

The staff project officer on the resource portion of this study was Don A. Seastone, with Eugene E. Hughes as associate project officer. The legal portion of the study was conducted under the supervision of Joe W. Ingram as staff project officer.

Sincerely,


Milton A. Pearl
Director

Enclosures

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Representative Compton I. White, Jr., Idaho, from its inception until January 1967.
Representative Rogers C. B. Morton, Maryland - February 1965 - January 1967.
Representative Walter Rogers, Texas - July 1965 - January 1967.
Representative Ralph J. Rivers, Alaska - August 1966 - January 1967.

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Sean M. Welsh

Listed above is the staff as constituted in August 1969, when the initial manuscripts were being readied for publication by the Clearinghouse for Federal Scientific and Technical Information, plus additional employees who joined the staff subsequent to that date but before publication of this report.

Harry L. Moffett served as Assistant Director (Administration) from October 1966 to July 1969, and Leland O. Graham, Arthur D. Smith and Max M. Tharp made significant contributions as members of the staff prior to August 1969.

ADVISORY COUNCIL

(Federal Liaison Members)

The following are presently members of the Advisory Council by virtue of their appointment under the provision of the Commission's organic act providing that:

"The Chairman of the Commission shall request the head of each Federal department or independent agency which has an interest in or responsibility with respect to the retention, management, or disposition of the public lands to appoint, and the head of such department or agency shall appoint, a liaison officer who shall work closely with the Commission and its staff in matters pertaining to this Act."

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Real Property Management

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Land and Natural Resources

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Solicitor

Department of Agriculture
Dr. T. K. Cowden
Assistant Secretary

Department of Commerce
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Federal Cochairman
Four Corners Regional Commission

Department of Housing and
Urban Development
Samuel C. Jackson
Assistant Secretary for
Metropolitan Development

Atomic Energy Commission
James T. Ramey
Commissioner

Federal Power Commission
John A. Carver, Jr.
Commissioner

General Services Administration
John W. Chapman, Jr.
Deputy Administrator

(Cont.)

(Non-Federal Government Members)

These 25 members of the Advisory Council are appointed under the provisions of the Commission's organic act, which states that:

"There is hereby established an Advisory Council, which shall consist of the liaison officers appointed under Section 5 of this Act, together with 25 additional members appointed by the Commission who shall be representative of the various major citizen's groups interested in problems relating to the retention, management, and disposition of the public lands,..."

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Portland, Oregon

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Department of Game
State of Washington
Olympia, Washington

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California Western University
San Diego, California

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Colorado School of Mines
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Olympia, Washington

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Chief Fire Warden
Clearwater & Potlatch Timber
Protective Associations
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Central National Bank & Trust
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Frederic L. Kirgis
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Natural Resource Department
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Bruce Renwick
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Counsel
Southern California
Edison Company
Los Angeles, California

Fred Smith
Businessman; Trustee
Jackson Hole Preserve, Inc.
New York, New York

H. A. "Dave" True, Jr.
Chief Executive Officer
True Oil Company
Casper, Wyoming

Michael F. Widman, Jr.
Director
Research & Marketing Dept.
United Mine Workers of
America
Washington, D. C.

GOVERNORS' REPRESENTATIVES

The Commission's Organic Act states that "The Chairman of the Commission shall invite the Governor of each State to designate a representative to work closely with the Commission and its staff and with the Advisory Council in matters pertaining to this Act". The following are serving as representatives of the Governors of their respective States at this time:

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Joe W. Graham
Director
Department of Conservation
Montgomery, Alabama

ALASKA
Robert L. Hartig
Assistant Attorney General
Anchorage, Alaska

ARIZONA
Lloyd N. Smith
Vice President
Salt River Project
Phoenix, Arizona

ARKANSAS
L. Y. Rowe, Esq.
El Dorado, Arkansas

CALIFORNIA
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Administrator
The Resources Agency of Calif.
Sacramento, California

COLORADO
Stephen H. Hart
Denver, Colorado

CONNECTICUT
Joseph N. Gill
Commissioner
Department of Agriculture
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Hartford, Connecticut

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Delaware State Planning Office
Dover, Delaware

FLORIDA
Ney Landrum
Director
Florida Outdoor Recreational
Development Council
Tallahassee, Florida

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State Planning Officer
Atlanta, Georgia

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Sunao Kido
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PUBLIC LAND LAW REVIEW COMMISSION

Background

The public lands of America date back to the time of the Union's formation. Then, and soon thereafter, seven of the original States ceded to the Central Government some 233.4 million acres of land lying westward to the Mississippi River. Thereafter, through purchase and treaty, the United States acquired an additional billion acres of public domain, the last acquisition being the purchase of Alaska from Russia in 1867. Altogether, nearly 2 billion acres of land in 32 States have been part of the public domain at one time or another.

At first, these lands were sold for their revenue. Eventually, however, as the pioneers swept westward, the revenue-raising policy was replaced by one stressing settlement and development of the land. The Homestead Act of 1862 was the first of a series of settlement and development laws enacted over a period of some 60 years - the desert land law, mining laws, and the various homestead laws - all designed to meet a particular need of the period. Meanwhile, many millions of acres were transferred to private ownership through military, railroad, and other land grants, including various grants to the States.

Through these means, nearly 1.2 billion acres have passed from Federal ownership, leaving approximately 715 million acres of the original public domain lands in Federal ownership. Of these 715 million acres 364 million are in the State of Alaska. Add to this the 52 million acres acquired for various purposes, and federally owned lands today amount to approximately 770 million acres - about one-third of the Nation's total land area. Some of these lands are in national forests and some are reserved for national parks, wildlife refuges, and other specific uses; but more than half constitute the "vacant and unappropriated" public domain lands which have never left Federal ownership and have not been dedicated to a specific use pursuant to legislative authorization.

The Act establishing the Public Land Law Review Commission contains in section 10 the following definition:

As used in this Act, the term 'public lands' includes (a) the public domain of the United States, (b) reservations, other than Indian reservations, created from the public domain, (c) lands permanently or temporarily withdrawn, reserved or withheld from private appropriation and disposal under the public land laws, including the mining laws, (d) outstanding interests of the United States in lands patented, conveyed in fee or otherwise, under the public land laws, (e) national forests, (f) wildlife refuges and ranges, and (g) the surface and subsurface resources of all such lands, including the disposition or restriction on disposition of the mineral resources in lands defined by appropriate statute, treaty, or judicial determination as being under the control of the United States in the Outer Continental Shelf.

Working with the Commission are a 33-member Advisory Council and the representatives of the 50 State Governors.

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Kansas City, Kansas

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Bill Sharp
c/o Commissioners of
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Irving Hand
Executive Director
State Planning Board
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Deputy Commissioner
Department of Conservation
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General Land Office
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Lander, Wyoming

PUBLIC LAND LAW REVIEW COMMISSION

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Through these means, nearly 1.2 billion acres have passed from Federal ownership, leaving approximately 715 million acres of the original public domain lands in Federal ownership. Of these 715 million acres 364 million are in the State of Alaska. Add to this the 52 million acres acquired for various purposes, and federally owned lands today amount to approximately 770 million acres - about one-third of the Nation's total land area. Some of these lands are in national forests and some are reserved for national parks, wildlife refuges, and other specific uses; but more than half constitute the "vacant and unappropriated" public domain lands which have never left Federal ownership and have not been dedicated to a specific use pursuant to legislative authorization.

The Act establishing the Public Land Law Review Commission contains in section 10 the following definition:

As used in this Act, the term 'public lands' includes (a) the public domain of the United States, (b) reservations, other than Indian reservations, created from the public domain, (c) lands permanently or temporarily withdrawn, reserved or withheld from private appropriation and disposal under the public land laws, including the mining laws, (d) outstanding interests of the United States in lands patented, conveyed in fee or otherwise, under the public land laws, (e) national forests, (f) wildlife refuges and ranges, and (g) the surface and subsurface resources of all such lands, including the disposition or restriction on disposition of the mineral resources in lands defined by appropriate statute, treaty, or judicial determination as being under the control of the United States in the Outer Continental Shelf.

Working with the Commission are a 33-member Advisory Council and the representatives of the 50 State Governors.

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LEGAL STUDY OF THE FEDERAL PUBLIC LAND LAWS
AND POLICIES RELATING TO INTENSIVE AGRICULTURE

SUMMARY

The Federal public land laws relating to intensive agriculture probably have been the most popular land laws in the history of our country. Almost every American history textbook mentions homesteads. The very word conjures up a romantic picture of a pioneer family heading west in a covered wagon in search of new lands and opportunities. Perhaps this imaginary picture tells more about the agricultural land laws than a thousand words. Like the covered wagon, the laws were adapted to conditions that have long since passed from the scene. The question is whether it is time now for these laws also to pass from the scene.

When the agricultural land laws, that is the homestead, desert land and Indian allotment laws, were adopted, the United States owned an abundance of land suitable for agricultural use. The population of the country was only a fraction of what it is today and America was still predominately an agrarian society. These laws were immediately popular and hundreds of thousands of Americans took advantage of them. During the century of their existence approximately 300,000,000 acres of public domain have been disposed of to people willing to clear the land and try to establish family farms. However, the heyday of homesteading, like the pioneer family on the trail, disappeared in the west many years ago. The decline in homesteading is illustrated by Table A. The history of the desert land and Indian allotment laws is much the same. Today, outside of some homesteading in Alaska and several dozen desert land entries each year in Idaho and Nevada, there is very little activity under these laws.

TABLE A

FINAL HOMESTEAD ENTRIES APPROVED
May 20, 1862 - June 30, 1967

Years	Number	Acres
1862 - 70	10,778	1,379,116
1871 - 80	151,459	17,886,222
1881 - 90	210,422	28,960,599
1891 - 1900	226,771	31,878,120
1901 - 10	274,551	38,818,285
1911 - 20	384,954	74,317,218
1921 - 30	159,388	40,390,683
1931 - 40	40,034	13,016,528
1941 - 50	4,045	921,108
1951 - 60	3,473	442,138
1961 - 67	1,153	149,648
Totals	1,467,028	248,159,665

The reasons for the sharp decline in the use of these laws are not hard to find. The early settlers naturally took the good farm lands first. Not much of the remaining public domain is suitable for agriculture, and most of that is situated in arid or semi-arid regions where it is often expensive to put the land into cultivation. In many such places it is not economically feasible to try to establish farms under the provisions of the present agricultural land laws.

The purpose of this study is to provide an analysis of the Federal agricultural land laws and policies for the use of the Public Land Law Review Commission in making recommendations on any modifications needed to assure that the public lands of the United States will be managed or disposed of in a manner to provide the maximum benefit for the general public.

This study is divided into three parts. The first part presents a review and analysis of the existing laws and policies. The present Federal procedures for classifying and disposing of agricultural land are examined. Part II includes a limited review of the laws of the eleven western states governing the disposal or use of state lands for agriculture and a summary of the leasing and special use practices of various Federal agencies having agricultural lands under their jurisdiction. Part III of the study presents problem areas that warrant the Commission's consideration and a review of various alternatives that have been suggested to the existing system of laws.

The Existing System of Laws and Policies

The General Homestead Laws

In 1862, President Lincoln signed the first homestead bill into law. Since then the homestead laws have been amended several times. Probably the most significant revision occurred in 1912 when legislation was adopted to allow homesteaders to make final applications for title in three rather than five years after entry. This amendment also permitted them to obtain title after a shorter period of residence than previously required and, in general, provided a more flexible approach for homesteading.

The homestead laws contain few provisions designating lands subject to entry. Basically, any unappropriated non-mineral public land can be entered. However, as will be discussed more fully later, today there is a further requirement. The land must be classified as suitable for agricultural use before it is open to homestead entry.

If the lands are valuable for minerals other than phosphate, nitrate, potash, oil, gas, or asphaltic minerals,

entry is not permitted. If one of these minerals is present, entry may be made provided that title to the minerals is reserved to the United States.

To qualify for homestead entry, an individual must be the head of a family, or twenty-one years of age, and a citizen of the United States or one who has filed his declaration of intention to become a citizen. The homestead laws have been interpreted to forbid a married woman from making entry unless she is the head of a family. The philosophy behind this rule is that the homestead law requires the establishment and maintenance of a home on the land entered and the husband, as head of the family, is the only party free to choose the family home.

The right to homestead is limited to persons who own no more than 160 acres of other land. This provision, however, applies only at the time entry is made and the entryman is not disqualified from obtaining a homestead patent if he acquires more than 160 acres of other land after entry.

The entryman may apply for up to 160 acres of homestead land. However, only one entry may be made even though it is for less than the maximum acreage and regardless of whether it is ever perfected. The law, however, does give a second chance to otherwise qualified entrymen who lose, forfeit, or abandon a previous entry if the loss, forfeiture, or abandonment was due to causes beyond the entryman's control.

To apply for a homestead entry, an application must be filed in the proper land office and a fee paid. At the time of applying the entryman must state by affidavit that:

(1) he is the head of the family or over twenty-one years of age; (2) the application is made honestly and in good faith for the purpose of actual settlement; (3) the entry is not made for the benefit of any other person or a corporation; and (4) the entryman will faithfully endeavor to comply with all the requirements of the law.

If the application is approved, the entryman has five years in which to fulfill the requirements for final proof, which are a prerequisite to obtaining title. The law establishes three general requirements. First, the entryman must construct a habitable house upon the entry. Second, within six months after entering the land, the entryman must establish residence on the land and thereafter, except under certain circumstances, maintain his residence there for at least seven months out of each of the next three years. Third, the entryman must cultivate one-sixteenth of the homestead entry beginning with the second year of entry, and not less than one-eighth beginning with the third year of entry, and until final proof is filed.

The required cultivation must entail a good faith effort to raise an agricultural crop upon the entry. Cultivation is defined as the breaking and tilling of the ground for the raising of annual crops or orchard produce. The term cultivation does not include activities which involve using the native trees, and does not include forage production for stock raising purposes. If the entry is located in an arid or semi-arid region, good faith cultivation should include all irrigation necessary to insure the success of the crop. Lack of irrigation will raise a presumption of bad faith and may result in the rejection of the entryman's final proof.

The homestead laws forbid alienation of the entry prior to final proof, for any use other than church, cemetery, or school purposes, or for railroad, telegraph, telephone, canal, reservoir, or ditch rights of way. This prohibition, however, does not prohibit mortgaging the entry for the purpose of securing money for improvements.

Final proof is completed by filing a notice of intention to submit final proof with the local land office. The notice is published and the entryman and two witnesses testify as to the facts evidencing completion of all statutory requirements. The final proof must be made by the entryman personally, and cannot be made by agents or attorneys. If an entryman dies before filing final proof, his widow or heirs may complete the statutory requirements and submit such proof in his place. In order for the widow or heirs to receive the benefits of the deceased's efforts, the entryman must have complied with all the laws prior to his death.

After completion of all the requirements and submission of final proof, the entryman is entitled to receive a patent to the land. Although certain fees are charged, the entryman is not required to pay anything for the land. Once the patent is issued the entryman is free from any further requirements of the homestead laws.

Special Homestead Laws

As the more desirable lands were settled and the American frontier moved west, pressures grew to amend and supplement the homestead laws to correct certain deficiencies and inequities. As mentioned earlier, the homestead laws were amended to reduce the time required to perfect a homestead from five years to three years. Congress also adopted several supplemental laws creating special types of homesteads. These laws permitted the commutation of homestead entries and the entry of additional homesteads and created two new forms of homesteads, enlarged and reclamation.

Commutation is a procedure which permits the entryman to reduce the homestead cultivation and residence requirements

by payment of the statutorily established price for the land (usually \$1.25 per acre). It was known that some who accepted the proposal to homestead in utmost good faith would, due to unknown future circumstances, be unable to complete the long period of residence and cultivation. Therefore, the commutation provision was enacted as a relief against such unforeseen circumstances. A homestead entry may be commuted anytime after fourteen months of residence on the land. During this fourteen month period the normal residency and cultivation requirements apply.

Congress adopted the "additional entry statutes" to permit an entryman who has made an initial entry of less than 160 acres to enter additional land to bring his total holdings up to this statutory maximum. There are two types of additional entries, contiguous and noncontiguous. A contiguous additional entry may be made before or after final proof has been filed on the original entry. In order to perfect the additional entry the entryman must cultivate an amount equal to one-eighth the area of the additional entry for at least one year. Such cultivation may be had on either the original or the additional entry. No residence is required on the contiguous additional entry.

Noncontiguous additional entries may be made only after final proof has been filed on the original entry. Although the entryman must still own the original entry in order to make a contiguous additional entry, the same is not true with regard to noncontiguous entries. However, the noncontiguous additional entryman must establish residence on and cultivate his additional entry in the same manner as original homestead entrymen.

By the end of the nineteenth century most of the remaining public land consisted of large tracts of arid or semi-arid lands. Congress soon realized that more than 160 acres of land was required to profitably farm such arid regions. Therefore, in 1904 Congress passed the Kinkaid Act to apply to arid portions of western Nebraska and in 1909 the Enlarged Homestead Act which applies to the states of Montana, Wyoming, Colorado, New Mexico, Arizona, Utah, Nevada, California, Kansas, North Dakota, Oregon, South Dakota, Washington and Idaho.

The enlarged homestead laws permit a qualified entryman to enter up to 320 acres of arid lands which cannot be economically irrigated and are, therefore, only susceptible to dry farming methods. Prospective entrymen must meet the same eligibility requirements as regular homestead entrymen, and the residence and cultivation requirements are also identical to the general homestead laws. The only differences between the enlarged and general homestead laws are that nonarid lands or arid lands susceptible to irrigation cannot be entered for an enlarged homestead and that up to 320 acres can be obtained.

in an enlarged entry.

In two states, Idaho and Utah, the law provides for nonresidence enlarged homesteads. In order to qualify for such a homestead, the entryman must prove that there is insufficient water on the land to provide for normal domestic needs. However, to compensate for the lack of required residence, the entryman must cultivate a greater acreage than is otherwise required for enlarged entries.

The enlarged homestead laws permit additional entries similar to those authorized under the general homestead laws. However, here there are three types of additional entries and the final proof requirements are rather complex. The intent of these provisions is to enable an entryman whose original entry was less than 320 acres to enlarge his entry up to the statutory maximum. It is important to note that any of the three types of enlarged additional entries may be made by entrymen whose original entries were either regular or enlarged homestead entries.

The Kinkaid Act is very similar to the enlarged homestead laws except that it applies only to the northwestern portion of Nebraska and until passage of the Taylor Grazing Act in 1934 permitted entry of 640 acres instead of only 320 acres. In addition to the other homestead final proof requirements, a Kinkaid Act entryman must affirmatively show that he has placed improvements on the land valued at \$1.25 per acre.

The reclamation homestead laws, which were adopted in 1902, are designed to aid in the settlement of public lands within the service area of Federal reclamation projects. Lands which may be potentially benefited by a reclamation project are withdrawn from entry under the public land laws and are divided into what are commonly known as "farm units". These farm units may not exceed 160 acres, but may be less if in the judgment of the Secretary of the Interior less acreage is needed to support a family.

Once the reclamation project is completed and water is ready to be delivered to the public lands, the Department of the Interior opens the lands for entry and accepts applications. The entryman must not only meet the general requirements for homestead entrymen, but must satisfy special requirements as to industry, experience, character and capital as well as being able to give reasonable assurance that he will succeed in farming the land. He must also reclaim, irrigate and cultivate one-half of his entry. In addition he has two sets of final proof requirements to meet, the general homestead requirements other than cultivation, and reclamation final proof requirements. Reclamation final proof must be filed simultaneously with or after the homestead proof is filed.

In all aspects, other than those discussed, the special homestead laws are identical to the general homestead laws. Once the entryman has fulfilled all the final proof requirements, he receives a clear title to his land and is free from any further statutory requirements, except in the case of reclamation homesteads. After receiving his patent, the reclamation homesteader is still required to complete the payment of all construction charges attributable to his land and the reclamation homesteader is also subject to the excess land provisions of the reclamation law, at least until he has completed the construction payments. There is some controversy for whether the reclamation homesteader is free of such excess land provisions after he has made his final construction payment.

The Desert Land Laws

The first Congressional enactment designed to encourage settlement and reclamation of the arid and semi-arid regions of the west was the Desert Land Act passed in 1877. The objectives of this act differ somewhat from those of the original homestead legislation. The desert land laws do not grant free land to settlers, but requires the payment of \$1.25 per acre and proof that at least \$3.00 per acre have been expended on reclamation and development.

For purposes of the Desert Land Act, which applies only in the States of Arizona, California, Colorado, Oregon, Nevada, Washington, Idaho, Montana, Utah, Wyoming, New Mexico and North and South Dakota, all lands, exclusive of timberlands, which will not produce some agricultural crop without irrigation are considered desert lands. Mineral lands may be entered under the desert land laws to the same extent as under the homestead laws. The qualifications for entrymen, however, are more general than those under the homestead laws in that married women may make entries, and may do so without taking into account entries made by their husbands.

The desert land laws, like the homestead laws, prohibit corporations from making entries or taking desert land assignments. Only individuals may do so. The individual entryman must be a resident citizen of the state or territory in which the land sought to be entered is located. This rule, however, does not apply to Nevada. The term "resident citizen" has been interpreted to mean domicile. Domicile must be proven at the time of entry; however, it need not be maintained after that time.

The homestead laws deny owners of more than 160 acres of other land the right to make entry, but the desert land laws do not include a similar qualification. Therefore, a desert land entryman may own thousands of acres of other land, if the land was acquired from private sources.

A prospective entryman may apply for up to 320 acres. He must file a declaration under oath, in the form of a six-page application, that: (1) he is twenty-one years of age; (2) he is a citizen of the United States or has filed a declaration of intention to become a citizen; (3) that lands are essentially nonmineral; (4) the application is made without intention of obtaining title to lands known or

classified as valuable for minerals or timber; (5) The lands are unoccupied; and (6) the lands are not reclaimed. The entryman must also supply information showing his plan of irrigation, stating the status of his attempts to obtain water rights, showing the results of soil tests on the entry, and giving figures which will demonstrate the economic feasibility of the proposed farming enterprise. Applications for desert land entries are subject to section 7 of the Taylor Grazing Act. Therefore, as in the case of the general homestead laws, entry may not be made until the land has been classified as suitable for agricultural use.

Before his application will be approved, the entryman must show plausible, presumptive evidence of a water supply sufficient to irrigate all irrigable portions of his entry. This water right must be appropriative in nature or be purchased from an approved water or irrigation company. The water supply may not be dependent upon a riparian right or correlative groundwater right. The application must also describe the proposed irrigation system, and show that it is economically feasible to farm the proposed entry using the described system.

In order to obtain title to the entered land, the entryman must carry out certain final proof requirements. First, he must expend in developing the entry at least \$1.00 per acre per year for the first three years. This requirement was put in the law to test the sincerity and good faith of the entryman, and to prevent continued occupation of public lands by persons who have no intention of reclaiming them. The annual proof expenditures must be made for necessary irrigation, reclamation, and cultivation works and for permanent improvements on the land. Therefore, expenditures for construction of a dwelling house or for machinery which is not a permanent improvement but merely the means of making permanent improvements will not meet the annual proof requirements.

While at the time he files his application the entryman need only show plausible presumptive evidence of a water right, when he makes final proof he must show that the water right has been perfected. Not only must he show a sufficient water right, but he must also show that an actual water supply exists to satisfy his legal right. In addition, the entryman must show that he has constructed works which will allow the water to be placed on all of the irrigable land of the entry. In other words, he must reclaim the entry. Reclamation also includes cultivation of at least one-eighth of the entry. Irrigated cultivation is required, and must constitute a good faith effort to raise a crop. This latter requirement is the same as that found in the homestead laws.

A desert land entry may be assigned to a third party, providing the assignee meets all the requirements for desert

land entrymen. An assignment may include all or part of an entry, but must be made up of legal subdivisions. Since an assignment is considered the same as an original entry, one who has previously made an entry on his own behalf or has received another assignment, may not take an assignment. An attempted assignment to someone not qualified to be an entryman is void and will cause a forfeiture of the entry. The entryman may also mortgage his interest in the entry in order to raise funds with which to develop the property, provided the mortgage does not constitute a conveyance of title. The mortgage lien, of course, is subordinate to the interest of the United States.

A recent decision involving a group of desert land entries has generated a great deal of interest. This case, commonly known as the "Indian Hill" decision, concerned a group of entrymen who joined together in an attempt to develop a common irrigation system because individual irrigation systems would have been too expensive in that area to permit economic farming. Serious financing problems arose, however, and a corporation stepped in, supplied most of the money for developing the entries and through a lease-mortgage arrangement operated twelve entries totalling over 3,000 acres as a single entity. The Bureau of Land Management challenged this operation as an invalid assignment to a corporation and an excess holding in violation of the provision that permits no person to hold more than 320 acres of desert lands.

Although the financing arrangements did not, on their face, indicate that an assignment to a corporation had occurred, the Bureau of Land Management successfully contended that the purpose and effect of the various transactions was to assign the entries to the corporation in violation of the law. The case was appealed to the Secretary of the Interior who upheld the Bureau's contention and cancelled the desert land entries after almost \$1,000,000 worth of improvements had been constructed.

In an effort to prevent any more "Indian Hill" situations, the Department of the Interior has adopted numerous policy and procedural guidelines. Today applications for group entries will be allowed only if the following conditions are met: (1) there must be an affirmative showing that the desert land entry proposal is feasible from an engineering point of view; (2) there must be an affirmative showing that the proposal will be feasible over a sufficient period, and the soil conditions and other physical characteristics are such, as to reasonably assure continued farm production under proper conservation management; (3) there must be an affirmative showing that each entry in the proposal taken independently is economically and physically feasible; and (4) the entrymen must make full disclosure regarding the arrangements, financial and otherwise, among the applicants and other parties,

so the Bureau of Land Management can make an informed judgment as to whether the arrangements are consistent with the applicable statutes and regulations and do not constitute fraud. As might be imagined, the cost of developing such information, from an engineering and legal point of view, may run into thousands of dollars. With all this capital investment required prior to application, the \$1.25 per acre and the minimum of \$3.00 per acre development expenditures are insignificant.

Once the desert land entryman has met all the requirements of the law, he must file his final proof. He may apply for an extension of time to file such final proof if he can show that external physical difficulties have prevented completion of the necessary reclamation. The term "external physical difficulties" does not mean ill health or financial troubles. The statutes authorize extensions up to a maximum of nine years upon a proper showing of good faith. Upon successfully making final proof, the entryman is granted title free and clear from further restrictions and holds the land as any other private owner.

The Indian Allotment Laws

From time to time Congress has passed laws giving Indians special rights to acquire public land. In 1875 and 1884 Indian homestead laws were adopted and in 1887 the General Allotment Act was enacted. Under these laws, as amended, Indians are eligible for homesteads or allotments. Allotments off a reservation can be granted to Indians who are recognized members of a tribe and have not yet obtained an allotment or homestead. Allotments may be granted not only to the head of the family, but to the Indian's wife and minor children. The maximum size of each allotment is 40 acres of irrigable land, 80 acres of nonirrigable land and 160 acres of grazing land. The maximum size of Indian homesteads is the same as any other homestead.

The principal differences between the laws and regulations governing Indian homesteads and allotments and those pertaining to regular homesteads, other than the acreage limitations just mentioned, are (1) that the residence requirements for Indians are relaxed because of the assumed nomadic character of Indians and (2) that Indians are not given immediate patents, but rather must have their lands held in trust by the United States. The trust period provided by statute is twenty-five years, but the Secretary of the Interior has authority to shorten or lengthen this period under certain circumstances. These trust provisions restrict the allottee in prohibiting alienation of the property, but an advantage is also gained. Because the property is held in trust by the United States, it is not subject to taxation during the trust period.

The Indian allotment laws were enacted at a time when the Indian was presumed to be uncivilized. They are based upon

the premise that he is not fully capable of managing his own affairs and therefore needs the protection of the great white father until he learns civilized ways and gains experience in property management. If these premises are no longer valid, or if they were erroneous to begin with, consideration should be given to whether there is a need to retain the allotment laws.

The Effect of the Classification Laws and Procedures

The procedures for obtaining a homestead, desert land entry or allotment were substantially changed in the 1930's with the passage of the Taylor Grazing Act and the issuance of Executive Orders Nos. 6910 and 6964. Section 7 of the Taylor Grazing Act authorizes the Secretary of the Interior to classify lands as to their suitability for the production of agricultural crops, and the executive orders withdrew all of the remaining public domain from settlement and entry and reserved it for classification pending determination of its most useful purpose.

Then in 1964, concurrently with the establishment of the Public Land Law Review Commission, Congress passed the Classification and Multiple Use Act of 1964 and the Public Land Sales Act of 1964.

The 1964 Classification Act directs the Secretary of the Interior to develop criteria for determining which public lands should be disposed of because they are required for community growth and development, or chiefly valuable for residential, commercial, agricultural, industrial or public uses and which lands should be retained for multiple use management. The act also requires the Secretary to review the public lands and classify them in the light of the criteria developed. It expressly states that it is not to be construed as a repeal of any existing law.

The 1964 Public Land Sales Act authorizes and directs the Secretary to dispose of lands that have been classified as chiefly valuable for agriculture. He is to dispose of such lands through competitive bidding at not less than the appraised fair market value. This act has not been interpreted as a repeal of the earlier agricultural land laws, and since its passage patents have been granted for homesteads, desert land entries and allotments.

The combination of these two 1964 statutes with the earlier Taylor Grazing Act and the executive orders has given the Secretary of the Interior tremendous power to control the disposal of agricultural land. Now a prospective entryman cannot enter any land until it is classified as chiefly valuable for agriculture and opened for entry under one or more of the agricultural disposal statutes. If the Secretary,

or his representative, refuses to classify the land as chiefly valuable for agriculture, or even if he does not decide to dispose of it under the 1964 Sales Act, the prospective entryman is prevented from taking advantage of the agricultural land laws.

Pursuant to the dictates of the 1964 Classification Act, the Secretary has promulgated criteria to be used by the Bureau of Land Management and the Department of the Interior in classifying land. Land is classified either on the Bureau's own initiative or when an applicant files a petition for classification. The courts have ruled that classifying land is a discretionary act of the Secretary and his judgment on such matters will be considered final as long as he does not act arbitrarily, capriciously or in excess of his authority. The courts have also said that through the use of his classification authority the Secretary can prevent people from making "scrip" or "in Lieu" selections or Indian allotment entries on lands he has not classified as suitable for such entries. What all this means as a practical matter is that the Secretary can determine whether the agricultural land laws will be available for use in any particular area. He, and not Congress, is the arbiter of whether any more homestead, desert land or Indian allotment entries will be permitted.

As might be expected, the classification decisions of the Bureau of Land Management and of the Secretary have been criticized by many would be entrymen and the wisdom of granting so much power to the Secretary has been questioned. Some of the most frequent complaints are that the Secretary has used his classification authority as a means of determining water rights and that he has placed too much emphasis on demonstrating economic feasibility before classifying land as suitable for agriculture.

While the authority to classify land given to the Secretary by the Taylor Grazing Act is permanent, the 1964 Classification and Multiple Use Act and Public Land Sales Act are scheduled to expire with the completion of the Commission's work. This fact alone dictates that some consideration be given to the question of how extensive the Secretary's classification authority should be in the future.

State Disposal Laws and Certain Federal Leasing Practices

In order to permit some comparison of different ways of managing and disposing of agricultural lands than that provided for in the homestead, desert land and allotment laws, a limited examination was made of the laws of the eleven western states and of the procedures followed by various Federal agencies. This review revealed that generally the states dispose of agriculture land through competitive bidding

at not less than the appraised price. This is the same procedure provided for in the Public Land Sales Act of 1964 for disposing of Federal land classified as chiefly valuable for agriculture. The states do not tend to have any acreage limitation policies. Anyone can bid at the sales regardless of how much land he owns or has previously acquired from the state. In short, the state's disposal laws are oriented towards raising revenue and getting a full return from the land.

The review of Federal leasing policies showed a variety of procedures are followed, but certain features are common to most agencies' practices. They all tend to lease land or grant special use permits at rentals or fees commensurate with what is being charged for similar land in the area. Some agencies prefer competitive bidding while others tend to favor negotiated arrangements. Most of the agencies make no distinction between individuals and corporations in eligibility for leases or permits. This is a distinct difference from the eligibility requirements for homesteading or desert land entries. The Federal agencies generally put terms and conditions in their leases or permits covering such things as the kind of crops to be raised, crop rotation policies, and the soil conservation practices to be followed. Most agencies prohibit the raising of price supported surplus crops. One agency, the Bureau of Sport Fisheries and Wildlife, favors crop sharing agreements, as opposed to cash leases because it needs part of the crop for food for wildlife.

Perhaps the two most significant features of these Federal leasing and permit policies are that the Government tries to get full value for the use of its land and that most agencies will grant permits or lease to corporations, partnerships and associations as well as to individuals.

Problems and Alternatives

The analysis of the existing legal system indicated that there are problems involving the agricultural land laws. There are two principal reasons for these problems. The first is that the supply of Federal land suitable for agriculture has dwindled to the point where it is almost non-existent in many areas. The second is that some of the provisions of the agricultural land laws are not adaptable to modern agricultural economics and practices. As a result of these two factors, it may be that the homestead, desert land and Indian allotment laws are obsolete and should be repealed. This is one alternative to the existing system of laws that has been suggested.

In order to evaluate this and other alternatives, consideration should be given to the major problems that have arisen under the existing laws and policies. In considering

these problems the following questions should be kept in mind:

1. What land should be disposed of for agricultural purposes? Who should classify the land and what criteria should be used?
2. How should the Government dispose of the land? By sale through competitive bidding, free or low cost grants, long term leases or some other method?
3. Who should be eligible to acquire the land? Individuals only, or groups, corporations, partnerships and associations? Should present land ownership or other forms of wealth be a determining factor?
4. Should there be any acreage limitations on the amount of land that can be acquired?
5. Should any conditions be attached to the land such as cultivation and residence requirements?

Classification Problems

The classification laws and procedures present several problems for consideration. The Classification and Multiple Use and Public Land Sales Acts of 1964 are interim measures which will expire about the time the Commission completes its work. Unless they are made permanent or Congress makes clear the effect of their expiration, there will probably be serious disputes about the Secretary of the Interior's classification authority thereafter. One alternative is to make these laws permanent and thereby avoid such a problem. This would continue in existence the Secretary's extensive classification authority. Another alternative, if it is felt the Secretary's authority ought to be curbed, would be to make these laws permanent but with modifications restricting his classification power.

Problems in Determining How to Dispose of the Land

The method to be used in disposing of agricultural land is a second problem area. Once land is classified as chiefly valuable for agriculture it may be opened for homestead, desert land or allotment entries or the Secretary may elect to dispose of it by sale through competitive bidding. In fact, the Public Land Sales Act of 1964 directs the Secretary to dispose of land classified for agriculture to qualified governmental agencies at the appraised fair market value or to qualified individuals through competitive bidding at not less than the appraised fair market value. While the language of this act appears to be mandatory, the Secretary has not as yet construed it that way and has continued to approve some

homestead, desert land and allotment entries and patents since 1964. But the conflict between the philosophy of getting a full return for the Government's land, as expressed in the 1964 Sales Act, and that of granting free or low cost land as embodied in the homestead, desert land and allotment laws should be resolved. Repealing the older laws is one alternative for solving this problem. Others are also suggested in the study. They include changing the older laws to charge entrymen more for their land than is now done. Of course another alternative to this problem would be to do nothing. The 1964 Sales Act is due to expire six months after the Commission submits its final report to Congress and if it is not extended or made permanent the conflict between it and the older laws will end. Whether this is desirable is something to be considered.

Problems in Eligibility for Entries

A third area of problems involves the eligibility requirements for making agricultural entries. Only individuals are allowed to make entries. No entries can be made by groups or corporations, nor can entries be assigned or conveyed to anyone not eligible to be an entryman. These restrictions are causing problems for desert land entrymen. Very often the only feasible way to reclaim land is for a group of entrymen to construct irrigation works that will serve several entries. In making agreements for financing and constructing such joint facilities great care must be exercised to be sure the agreement will not be construed as an unpermitted assignment or mortgage.

Whether the restrictions against group entries and assignments need be as stringent as they are is open to question. An alternative to the present system would be to allow groups and corporations to make entries. In considering this alternative, cognizance should be taken of the 1964 Public Land Sales Act which provides for sales of agricultural land to "qualified individuals". This term is defined in that act to include partnerships, associations and corporations. Thus, if the Secretary opens agricultural land to sale, corporations are eligible to acquire it, but if he opens it for disposal under the homestead or desert land laws they cannot.

Acreage Limitation Problems

The acreage limitation provisions in the existing laws have not been changed for many years. Generally, economic farm units can no longer be established with only the acreage permitted under these laws. South Dakota State University, in doing the resources portion of this study, has collected data on the number of acres needed in various parts of the country for economic farm units. These data should be used

in determining what adjustments should be made in the present limitations. One way to adjust the limitations is simply to revise the present numbers upward. Another alternative, which provides more flexibility, is to permit varying limitations depending upon the characteristics of the area.

Problems in Meeting Final Proof Requirements

The homestead cultivation requirements of one-sixteenth of the area the second year after entry and one-eighth the third year may be antiquated. The fact that the homesteader must establish a residence on his entry but the desert land entryman need not do so seems to be an inconsistency. Another source of problems involves the entire matter of assigning, mortgaging and leasing of desert land entries and the hiring of third parties to perform the annual expenditure and reclamation requirements. Several alternatives to the present requirements are suggested. One is to require the entryman to get the entire entry under cultivation relatively soon after entry. Another alternative is to clarify the regulations so that entrymen will know exactly what terms they can safely include in contracts involving their entries without fear of having the agreements construed as unpermitted assignments or conveyances which would cause a forfeiture of the entry.

These are the most important problems discovered in examining the present laws and practices. The alternatives were developed from a review of proposed legislation and material and suggestions given to the Commission. The problems and alternatives are presented for the Commission's consideration, with no recommendations or conclusions being given in this report.

INTRODUCTION

A. Preface

In 1964 Congress decided that:

Because the public land laws of the United States have developed over a long period of years through a series of Acts of Congress which are not fully correlated with each other and because those laws, or some of them, may be inadequate to meet the current and future needs of the American people and because administration of the public lands and the laws relating thereto has been divided among several agencies of the Federal Government, it is necessary to have a comprehensive review of those laws and the rules and regulations promulgated thereunder and to determine whether and to what extent revision thereof are necessary. 1/

To carry out this review, Congress established the Public Land Law Review Commission and directed it to (1) study the laws and regulations governing the public lands, (2) review the policies and practices of the various Federal Agencies having jurisdiction over such lands, (3) compile data on the demands being made on such lands and (4) recommend such changes in the laws, regulations, policies and practices as the Commission determines necessary to enable the general public to obtain the maximum benefit from the public lands. 2/

This is the legal portion of one of a series of studies designed to provide a basis for carrying out the statutory directive that the Commission shall make such recommendations to the President and the Congress. This study deals with the laws and policies relating to intensive agricultural use of public lands.

B. Subject of the Study

For the purposes of this study, intensive agriculture has been defined by the Commission as "the production of crops other than range forage, including small grain and hay." The lands to be covered in this study may be generally described as those public lands outside of Alaska which are subject to disposal

1/ Act of Sept. 19, 1964, Pub. L. No. 88-606, sec. 2, 78 Stat. 983 (codified as amended at 43 U.S.C. sec. 1392 (1964)).

2/ Act of Sept. 19, 1964, Pub. L. No. 88-606, secs. 1, 4, 78 Stat. 983 (codified as amended at 43 U.S.C. sec. 1391, 1394 (1964)).

or use for agricultural purposes. ^{3/}

Over the past two hundred years Congress has enacted a number of statutes designed to encourage the development of public lands for agricultural purposes. These include the homestead, desert land, Indian allotment and reclamation laws and related acts pertaining to the disposal of agricultural lands. These laws, which comprise the major part of this study, differ from most of the other disposal statutes in that settlement and cultivation of the land are generally required in order for a patent to be issued. Also, all of these laws contain limitations upon the quantity of land an individual can obtain from the Federal Government.

While these laws were once used extensively and have resulted in the transfer of over 270,000,000 acres of agricultural land to private ownership, today very few new entries are being made and only a small number of patents are being issued under their provisions. In 1967 there were two original homestead entries made outside of Alaska. The number of final homestead entries approved was only 196 involving 23,405 acres, with all but 41 entries and 5,022 acres being in Alaska. The present activity under the desert land law is not much greater. In 1967 some 123 final desert land entries were approved involving just over 30,000 acres of land. And the granting of Indian allotments outside reservations virtually ceased with only 3 allotments for a total of 480 acres being approved in that same year. ^{4/} These figures contrast with those during the peak years of homesteading activity, which

^{3/} More precisely, the statute establishing the Commission describes the lands to be covered in Commission studies as: "(a) the public domain of the United States, (b) reservations, other than Indian reservations, created from the public domain, (c) lands permanently or temporarily withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws, including the mining laws, (d) outstanding interests of the United States in lands patented, conveyed in fee or otherwise, under the public land laws, (e) national forests, (f) wildlife refuges and ranges, and (g) the surface and subsurface resources of all such lands, including the disposition or restriction on disposition of the mineral resources in lands defined by appropriate statutes, treaty, or judicial determination as being under the control of the United States in the Outer Continental Shelf." 43 U.S.C. Par. 1400 (1964).

^{4/} Bureau of Land Management, Dept. of the Interior, Public Land Statistics: 1967, Table 15, at 43, Table 17, at 50, Table 20, at 52, Table 22, at 53; See Appendix A, Tables 1 and 2, p. A-1.

occurred prior to World War I. In two of those years the number of original entries exceeded 98,000 and in 1913 more than 59,000 final entries involving in excess of 10,000,000 acres were approved. ^{5/}

Since 1935 all of the public domain lands outside Alaska have been withdrawn from entry under the settlement laws either by Executive order or by inclusion in grazing districts established pursuant to the Taylor Grazing Act. ^{6/} Today, before any public domain lands can be entered under any of the laws discussed in this study, they must first be classified pursuant to the Taylor Grazing Act and the Classification and Multiple Use Act of September 19, 1964, ^{7/} as being chiefly valuable for agricultural use. Because of this requirement, a review of the classification laws and regulations insofar as they affect the disposal of land for agricultural purposes is included as a part of this study.

This study also briefly reviews the laws, regulations and practices of various Federal agencies that lease or grant permits for the use of public lands for agricultural purposes. Additionally, in the appendices there is a limited discussion of the laws and policies of the 11 western states of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming relating to the disposal or use of state owned land for intensive agriculture.

C. Description of the Study

The objectives of this legal portion of the intensive agriculture study are threefold. The first is to provide the Public Land Law Review Commission with a complete description of the existing system of laws, regulations, policies and practices governing the disposal or use under lease or permit of the public lands for intensive agriculture. The second objective is to identify the problem areas or matters, such as the possible present or rapidly approaching obsolescence of these laws as indicated by their infrequent use, which warrant the particular consideration of the Commission. The third objective is to list and analyze possible changes in the existing laws and policies or alternatives to them.

The description of the existing system is covered in the first part of the study. It begins with a consideration of the general homestead law which is the oldest of the agricultural disposal statutes. This is followed in turn by chapters covering special homestead laws, desert land entries, Indian allotments,

^{5/} See Appendix A. Table 1, p. A-2.

^{6/} Act of June 28, 1934, ch. 865, sec. 1, 48 Stat. 1269 (codified as amended at 43 U.S.C. sec. 315 (1964)).

^{7/} 78 Stat. 986-88, Pub. L. No. 88-607, secs. 1-8 (codified at 43 U.S.C. secs. 1411-1418 (1964)).

acreage limitations and the classification laws. In the second part of this study the use of Federal lands for agricultural purposes through leases and permits is discussed, and a comparative review of laws providing for the disposal or lease of agricultural lands by various states is presented. The method followed in these two parts is to review not only the statutes involved but the relevant court and administrative decisions and legal opinions. The administration of these laws, including delegations of authority, as reflected in Executive orders and directives, and agency regulations, manuals, directives and declarations of policy, is also examined.

It should be emphasized that the subject of these parts of the study is the present system of laws. It is not intended to be a historical study. Occasionally where it was necessary for full understanding, some history is presented.

But no attempt is made to describe in detail the historical events which led to the enactment of the laws or the promulgation of the regulations. The history of the public land laws is very ably covered in another study published by the Commission. ^{8/}

In the third and last part of the study, the problem areas disclosed by the examination of the existing legal system are discussed. The issues and factors involved and their effect are described. The research disclosed some areas that would be potential problems if the agricultural land laws were used as extensively today as they have been in the past, but most of those types of problems were considered to be irrelevant to today's situation. Only those problems and matters which appear to warrant the consideration of the Commission are presented.

In the last part of the study possible alternatives for solving some of the present problems are also set forth. These alternatives have been developed as a result of the review of the existing legal system and from information obtained from sources such as bills introduced in Congress and legislation proposed by Federal agencies and reputable nongovernment sources. The objectives of each alternative are set forth along with a discussion of the probable advantages and disadvantages of the alternative. There is no evaluation of the relative merits of the various alternatives, nor are any recommendations for specific action made. These are left to the Commission's discretion.

^{8/} P. Gates & R. Swenson, History of Public Land Law Development (1968).

PART I

REVIEW AND ANALYSIS OF THE EXISTING SYSTEM OF LAWS AND POLICIES FOR THE DISPOSAL OF AGRICULTURAL LANDS FOR INTENSIVE AGRICULTURAL PURPOSES

CHAPTER I

THE HOMESTEADING OF PUBLIC LANDS UNDER THE GENERAL HOMESTEAD LAWS

A. Introduction

On May 20, 1862, President Lincoln signed the homestead bill 1/into law, thus culminating over 30 years of effort on the part of many to provide free land to homesteaders rather than requiring them to pay for the land as provided for in the earlier preemption statutes. The Homestead Act permitted an entryman to enter up to 160 acres. This was not the first homestead bill to reach a President's desk. In 1860 President Buchanan vetoed a similar act on the theory that the law provided for an unconstitutional gift of a public asset. But the next Congress was determined that a homestead measure should become law and its bill was approved by the new President.

The original homestead law went into operation on January 1, 1863. Since that date over 1,600,000 persons have homesteaded over 270,000,000 acres of public land. The greatest activity occurred between the years 1886 and 1925 when an average of over 20,000 entries a year were approved. Since that time the activity has steadily declined until in 1967 less than 50 final entries were approved outside of Alaska. 2/

There are many reasons, both physical and sociological, why the number of homestead entries has declined. But the most obvious is that virtually all of the prime agricultural land was settled years ago. Practically all of the available land still held in public ownership lies in the western desert regions which are arid or semiarid in nature and which do not easily lend themselves to successful agriculture.

The homestead laws have been amended numerous times since 1862 as the nature of the lands available for entry has changed. In 1904, the so-called Kinkaid Act 3/ was passed specifically for the semiarid regions in western Nebraska. That act recognized a localized situation where the sandy hills and dry climate made less than 640 acres of land an uneconomic farm unit. In 1909 the Enlarged Homestead Act 4/ was passed to allow entry

1/ Act of May 20, 1862, ch. 75, 12 Stat. 392.

2/ See Appendix A, Tables 1 & 2, p. A-1.

3/ Act of April 28, 1904, ch. 1801, secs. 1-3, 33 Stat. 547, 548 (codified as amended at 43 U.S.C. secs. 224 (1964)).

4/ Act of Feb. 19, 1909, ch. 160, secs. 1-6, 35 Stat. 639 (codified as amended at 43 U.S.C. sec. 218 (1964)).

of up to 320 acres in the arid and semiarid regions of the West. Once again the purpose of this act was to recognize that 160 acres of arid land was not an economic farm unit.

Probably the most significant revision of the original homestead enactment was the adoption of the 3 year homestead act in 1912. 5/ This legislation amended the law to allow homesteaders to make final application for title in 3 rather than 5 years. It also permitted them to obtain title after seven months' residence each year for three years, or a total of 21 months, instead of the 30 months required by the original act. This was a particularly important amendment as homesteading was seemingly on the wane and less adaptable to the remaining lands. The new procedure was more attractive to settlers than the earlier, less flexible law, and temporarily renewed interest in homesteading.

Still another amendment to the homestead laws was the Stock Raising Homestead Act adopted in 1916 which permits entry of up to 640 acres of grazing land. 6/ While this study deals only with laws pertaining to intensive agriculture which has been defined for the purposes of this study as "the production of crops other than range forage, including small grain and hay", the Stock Raising Homestead Act is mentioned to show another instance where Congress changed the acreage limitation provisions for a particular purpose.

This and the next chapter deal with each of the various types of homesteads permitted under present law, and discuss the substantive and procedural steps which must be taken in order to obtain title to the entered land. In this chapter the general homestead laws and procedures will be covered. Chapter 2 covers special homestead laws which modify or supplement the general laws. The present homestead laws, both general and special, are codified in Chapter 7 of Title 43 of the United States Code (Sections 161 through 302) and unless otherwise noted all citations in Chapters 1 and 2 refer to Title 43.

B. Lands Subject to Entry

The homestead laws contain only a few general provisions designating the land which are subject to entry. However, section 7 of the Taylor Grazing Act 7/ and the Classification

5/ Act of June 6, 1912, ch. 153, 37 Stat. 123 (codified at 43 U.S.C. secs. 164, 169 and amending sec. 218).

6/ Act of Dec. 29, 1916, ch. 9, secs. 1-11, 39 Stat. 862 (codified as amended at 43 U.S.C. sec. 291-301 (1964)).

7/ 43 U.S.C. sec. 315f (1964).

and Multiple Use Act of 1964 8/ require land to be classified before it can be opened to entry for homesteading and most other purposes. These classification laws and their effect on homestead entries are discussed in Chapter 6. The purpose of this chapter is to discuss the homestead laws and regulations as they apply to land that has already been classified as open to entry by homesteaders.

Section 161 states the general proposition that entry may be made upon 160 acres or less of "unappropriated public lands." This section, except as limited by other sections specifically excluding certain lands from entry, describes the lands subject to entry for homestead purposes. The land must be "unappropriated" and "public".

1. What Are "Public Lands"?

For purposes of homesteading, unsurveyed lands are not public lands 9/ even though they may be considered "public", when that term is used to distinguish public from private lands 10/ Until the lands are surveyed, a formal application for entry may not be filed. 11/ As of the year 1967, there were slightly over 100,000,000 acres of unsurveyed lands in the United States excluding Alaska. 12/ Therefore, entry pursuant to the provisions of section 161 would not be allowed on these lands until a survey is completed. Even if it were already surveyed, a considerable portion of these 100,000,000 acres probably could not be used for agricultural purposes, because much of it has been withdrawn or reserved for forest purposes or as isolated mountainous land and inaccessible.

Section 141 states that:

The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress. 13/

8/ 43 U.S.C. secs. 1411-1418 (1964).

9/ Douglass v. Rhodes, 280 F. 230 (E.D. Ark. 1922).

10/ Gauthier v. Morrison, 232 U.S. 452 (1914).

11/ Douglass v. Rhodes, 280 F. 230 (E.D. Ark. 1922).

12/ Bureau of Land Management, Dept. of the Interior, Public Land Statistics: 1967, Table 72, at 126.

13/ Act of June 25, 1910, ch. 421, sec. 1, 36 Stat. 846 (codified at 43 U.S.C. sec. 141 (1964)).

By virtue of this provision, the term public lands, as used in section 161, does not include land withdrawn by the government for national park, national forest, or other public purposes. 14/

2. What Are "Unappropriated Lands"?

Assuming the land is found to be public, the question arises as to whether it is unappropriated. The cases have held that if land is occupied by another party under a claim of title or right, it is appropriated and an entry may not be made even if the claim of title or right is invalid. 15/ This doctrine, however, is limited to entries made under claim of right or color of title. It does not apply to mere naked trespassers, and entry may be made even if an occupant is presently on the land. 16/

3. The Effects of Minerals on the Availability of Lands for Homesteading.

As a general rule, land that has been found to be unappropriated and public is available for immediate entry. However, this general rule is subject to several statutory exceptions. One of the most important exceptions is set forth in section 201, which states that mineral lands shall not be subject to entry or settlement upon showing that the land involved is more valuable for mineral than agricultural purposes if the showing is made at any time before final proof and payment are made. 17/ However, the absolute prohibition of section 201 is modified by 30 U.S.C. Par. 121 (1964). This latter section provides in part:

Lands withdrawn or classified as phosphate, nitrate, potash, oil, gas or asphaltic minerals, or which are valuable for those deposits, shall be subject to . . . entry, . . . if otherwise available, under the nonmineral land laws of the United States, whenever such . . . entry, . . . shall be made with a view of obtaining . . . title with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same.

14/ United States v. Payne, 8 F. 883 (W.D. Ark. 1881); United States v. Minnesota, 270 U.S. 181 (1926).

15/ Lyle v. Patterson, 228 U.S. 211 (1913); Emblen v. Lincoln Land Co., 184 U.S. 660 (1902); Dockendorf v. Bassett, 160 F. 543 (C.C.N.D. Iowa 1908); Tidwell v. Chiracahua Cattle Co., 5 Ariz. 352, 53 P. 192 (1898).

16/ Dennis v. Jean, A-20899 (Interior Dec., July 24, 1937).

17/ Bay v. Oklahoma Southern Gas, Oil and Min. Co., 13 Ok. 425, 73 P. 936 (1903).

Thus, today, certain mineral lands may be entered to the same extent as nonmineral lands if the entryman is willing to consent to the United States reserving title to the minerals.

Section 201 still applies when the minerals located on the land are not those mentioned in the previous paragraph. For this reason, or in order to determine if the entryman is to receive the entire fee or one subject to a reservation, it is important to determine whether the property to be entered is mineral land. The term minerals refers to mineable substances which have a particular property or characteristics giving them special value. Under this definition, deposits of sand and gravel do not render lands otherwise subject to entry mineral lands. 18/ The primary criterion is whether at the time of issuance of the patent the land is more valuable for mineral use than for agricultural use. As indicated by one Department of the Interior decision, to exclude lands from entry on account of sandstone deposits, it must appear that the land is more valuable for the stone than for agriculture. 19/

Reasonable hope and expectation that minerals will be found, notwithstanding long periods of unsuccessful prospecting, is insufficient to defeat a public land grant. The test is whether at the time patent was issued the land was known to be valuable for minerals. 20/ One who has made a homestead entry may be divested if, at any time before a patent is issued, the land is found to be more valuable for minerals than for agricultural purposes. 21/ However, in the absence of fraud, a determination subsequent to the issuance of a patent that the land contains valuable mineral deposits cannot affect the title obtained by the patentee. 22/

18/ The headnote in Zimmerman v. Brunson, 39 L.D. 310 (1910), states: "Deposits of gravel and sand, suitable for mixing with cement for concrete construction, but having no peculiar property or characteristic giving them special value, and deriving their chief value from proximity to a town, do not render the land in which they are found mineral in character within the meaning of the mining laws, or bar entry under the homestead laws, notwithstanding the land may be more valuable on account of such deposits than for agricultural purposes." See also Conlin v. Kelly, 12 L.D. 1 (1891).

19/ Long v. Isaksen, 23 L.D. 353 (1896).

20/ United States v. Central Pacific Ry., 52 F.2d 703 (N.D. Cal. 1928).

21/ Bay v. Oklahoma Southern Gas, Oil & Min. Co., 13 Okl. 425, 73 P. 936 (1903).

22/ Colorado Coal & Iron Co. v. United States, 123 U.S. 307 (1887).

If the nonmineral agricultural entry is made on land which may contain valuable deposits of the minerals listed in 30 U.S.C. sec. 121 (phosphate, nitrate, potash, oil, gas, or asphaltic minerals) the regulations of the Department of the Interior 23/ establish procedures to determine if the patent should be made subject to a reservation. If the land has been designated mineral in nature prior to an entry, a qualified entryman may present an application to enter the land with a view to obtaining a patent either subject to or without reservation. 24/ All such applications to enter must have stamped or printed on their face that they are made subject to the provisions of 30 U.S.C. sec. 121. 25/ If the entryman desires to take the land free of mineral reservations, the burden of proof is upon him to show that the land has been erroneously designated as mineral land. 26/ A withdrawal or classification will be deemed prima facie evidence that the land is mineral in character. 27/ If the application for reclassification of the lands is disapproved, the applicant may file an application to enter the land in accordance with and subject to the mineral reservations. 28/

Since, as noted above, land can be classified as mineral in nature even after entry but prior to final proof, persons who have entered lands which are subsequently withdrawn or classified as valuable for mineral deposits are allowed the same privilege of showing, at any time before final proof, that the lands are in fact nonmineral in character. 29/

With reference to oil and gas deposits, if land embraced in a nonmineral entry on which final proof has not been submitted is located in an area in which the Geological Survey reports valuable deposits of oil and gas may occur due to the absence of reliable evidence that the land is affected by geological structures unfavorable to oil and gas accumulation, the entryman must make a positive showing that the lands are nonmineral in character or any patent issued will be impressed with a reservation of oil and gas to the United States. 30/ This regulation, which does not appear to have

23/ 43 C.F.R. sec. 2023.4-3 (1968).

24/ 30 U.S.C. sec. 122 (1964); 43 C.F.R. secs. 2023.4-3(d)(1)(i), 2023.4-3(d)(1)(ii) (1968).

25/ 43 C.F.R. sec. 2023.4-3(b) (1968).

26/ 43 C.F.R. sec. 2023.4-3(e)(1) (1968).

27/ 43 C.F.R. sec. 2023.4-3(e)(2) (1968).

28/ 43 C.F.R. sec. 2023.4-3(d)(1)(v) (1968).

29/ 43 C.F.R. sec. 2023.4-3(d)(2)(i) (1968).

30/ 43 C.F.R. sec. 2023.4-3 (c)(1) (1968).

any express basis in the statutes, other than that found in section 1201, 31/ places a heavy burden on the entryman. Even though the land has not been classified as mineral, if the Geological Survey finds an absence of evidence of conditions unfavorable to oil and gas, the entryman must go forward and prove no such minerals exist. Once again, however, after the entryman has submitted final proof, a subsequent Geological Survey report showing the land to be valuable for minerals will not be relied upon as a basis for a mineral reservation in the patent unless the government is prepared to assume the burden of showing, prima facie, that the land was known to be of a mineral character at the date of acceptable final proof. 32/

4. Miscellaneous Statutes Opening Lands to Entry

While the statutes regarding minerals generally are restrictive in nature, there are several other statutory provisions which specifically open certain lands to entry. These are contained in the following sections of Title 43:

1. Section 202 provides that relinquished homestead entries become available for entry by another party automatically without further action on the part of the Secretary of the Interior. 33/

2. Section 203 extends the provisions of the homestead laws to the lands included within the limits of the former Ute Indian Reservation in Colorado.

3. Section 207 opens for disposition all agricultural lands embraced within military reservations in the State of Nevada which have been placed under the control of the Secretary of the Interior.

31/ Section 1201 43 U.S.C. sec. 1201 (1964) provides: "The Secretary of the Interior, or such officer as he may designate, is authorized to enforce and carry into execution, but appropriate regulations, every part of the provisions of this title not otherwise specifically provided for." This authority has been used by the Secretary as the basis for regulations promulgated by him and is cited in 43 C.F.R. Subpart 2023 as one of the authorities for this particular regulation.

32/ 43 C.F.R. sec. 2023.4-3(c)(2) (1968).

33/ This is subject to the qualification that the land would still be subject to the Secretary's classification authority. Therefore, if the land were classified as unsuitable for homesteading it would no longer be available for such an entry. Classification is covered more fully in Chapter 6.

4. Section 208 opens all unreserved public lands within the former Columbia or Moses Reserve in the State of Washington.

5. Section 209 extends the public land laws to the lands in that part of the Red River between the median line and the south bank of the river in Oklahoma, between the 98th meridian and the east boundary of the territory established as Greer County by the Act of May 4, 1896.

The effect of these laws is to open for entry lands that would otherwise be considered appropriated or withdrawn for a particular use.

C. Qualifications of Entrymen

The basic statutory requirements for entrymen are set forth in section 161, which provides in part:

Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one-quarter section, or less quantity, of unappropriated public lands, to be located in a body in conformity to the legal subdivisions of the public lands; but no person who is the proprietor of more than one hundred and sixty acres of land in any State or Territory, shall acquire any right under the homestead law. 34/

It can be seen from the above quotation that there are two positive requirements which must be fulfilled before one may enter land under the homestead laws and one negative restriction. First, the entryman must be at least twenty-one years of age or the head of a family. Second, the entryman must be a citizen or an alien who has filed a declaration of intention to become a citizen. The negative restriction is that the entryman shall not own more than 160 acres of other land. While these requirements have been set forth fairly succinctly by Congress, problems of interpretation have arisen, primarily in defining what is a "head of a family," in determining the status of women, and in deciding what constitutes ownership of more than 160 acres.

1. Who Qualifies as a Head of a Family?

The term "head of a family" is not defined by the Statutes or the regulations, but administrative decisions have

34/ 43 U.S.C. sec. 161 (1964).

interpreted the term as one who contracts, supervises, and manages the affairs about the house, not necessarily the father or husband. 35/

In order to be the head of a family, it is not necessary that one be under a legal obligation to support the family. A moral duty, if carried out, is sufficient. For example, if the oldest daughter of physically disabled parents undertakes to support the parents and raise her three younger brothers and sisters, she is the head of a family under the provisions of the statute. 36/

One may become the head of a family by virtue of adoption. In one case, a single woman about eighteen years of age adopted a ten year old boy under Kansas law. The Secretary held that the Department of the Interior would not question the validity of the decree and held that the adoption did create a head of a family situation. 37/

A homestead entry made by a minor who is not the head of a family is void. However, the entry becomes valid when he attains his majority prior to the inception of an adverse claim. 38/

2. The Rights of Women to Enter Land

In setting forth the qualifications of entrymen, section 161 makes no reference to sex or marital status. Clearly, an unmarried woman has the same rights as the unmarried male. But according to the regulations established by the Department of the Interior, 39/ a married woman may make entry only under one of the following circumstances:

1. She has been actually deserted by her husband.

2. Her husband is incapacitated by disease or otherwise from earning support for his family and the wife is really the head and main support of the family.

3. The husband is confined in a penitentiary and she is actually the head of the family.

35/ Henry Findley, A-22921 (Interior Dec., Nov. 30, 1942).

36/ Kelly v. Hastings and Dakota Ry., 30 L.D. 306 (1900).

37/ Newell v. Petefish, 20 L.D. 233, 235 (1895). But, see Henry Findley, A-22921, (Interior Dec. November 30, 1942), where a minor son adopted a child but continued to live with and be under the control of his father. The Secretary held that the son was not a head of a family for purposes of the homestead law.

38/ James F. Bright, 6 L.D. 602 (1888); Dillard v. Hurd 46 L.D. 51 (1917).

39/ 43 C.F.R. sec. 2211.0-6(c) (1968).

4. The married woman is the heir of a settler or contestant who dies before making entry.

The statutory basis for denying a married woman the right to make an entry unless she falls into one of these categories is unclear. Section 161 provides no basis for such restrictions. Section 166, adopted in 1880, is the only statute which seems to imply that a married woman may not make entry. The second paragraph of this section states in part:

Where an unmarried woman who has heretofore settled, or may hereafter settle, upon a tract of public land, improved, established, and maintained a bona fide residence thereon, with the intention of appropriating the same for a home, subject to the homestead law, and has married, or shall thereafter marry, before making entry of said land, or before making application to enter said land, she shall not on account of her marriage forfeit her right to make entry and receive patent for the land 40/

The authors of this provision must have felt that in its absence a married woman would not have had the right to convert her settlement into a homestead entry. Certainly it would be unusual for a wife to file an application for the family. However, other than this oblique reference, there is nothing in the statutes which would make such an entry invalid, providing the other requirements are fulfilled.

Over the years several married women have attempted to make entries. Their efforts have uniformly met with failure. The case of Case v. Kupferschmidt, 41/ contains the following rationale for the rule:

The homestead law requires the establishment and maintenance of a home upon the land entered to the exclusion of one elsewhere, and therefore contemplates that a homestead entry shall only be made by one who is free to choose his domicile or place of residence. By her marriage Miss Case elected to make her husband's domicile her domicile. He then became the head of the family and entitled to choose the place of their joint residence. Since then she has not, in the absence of legal cause for separation, been free to select or maintain a separate home or place of residence (citations omitted) and is therefore not qualified to make entry under the

40/ 43 U.S.C. sec. 166 (1964).

41/ 30 L.D. 9 (1900)

homestead law. 42/

In the case of Rachel M. McKee, 43/ the attorney for a married woman filed an argument with the Secretary of the Interior to show that section 161 has not at any time been properly construed by the Department of the Interior. The Secretary stated that the law, as interpreted, was in accordance with past practice and he could see no reason for setting it aside.

The decisions have even cancelled an entry made by a married woman where she was obviously acting as the agent for the married couple and both husband and wife resided upon the land after entry. In the case of Martha O. Murray, 44/ which involved such circumstances, the Secretary of the Interior said that the intent of the homestead law would have been realized but the manner in which Mrs. Murray proceeded varied from that prescribed by law, and therefore, he cancelled the entry. The Secretary did not state in what manner the entry was at variance with the law, or what law he had in mind.

3. The Effect of Ownership of Other Land

Section 161 states that no person who is the owner of more than 160 acres within any state or territory shall acquire any rights under the homestead laws. This provision has been interpreted to apply only to land owned at the time of entry, and the entryman is not disqualified from making final proof because, between the two events, he acquired more than 160 acres of other land. 45/

An administrative decision has also held that one who acquires more than 160 acres of community property in a community property state is not the proprietor of more than 160 acres within the meaning of the homestead laws if his undivided interest in such property does not exceed that amount. 46/

4. The Effect of Previous Entries

Generally, only one entry may be made under section 161 whether or not the entry is perfected and whether or not the maximum acreage is entered. However, in some circumstances a person who has abandoned his entry prior to final proof, is treated differently from one who has received a patent. Sec-

42/ Id. at 10-11.

43/ 2 L.D. 112 (1883).

44/ 2 L.D. 112 (1883).

45/ West v. E. Rutledge Timber Co., 210 F. 189 (D. Idaho 1913), aff'd 221 F. 30 (9th Cir. 1915).

46/ Thomas H. B. Glaspie, 53 L.D. 577 (1932).

tion 182 permits a second entry by one otherwise qualified, who has lost, forfeited, or abandoned a previous entry, provided that:

(S)uch applicant shall show to the satisfaction of the Secretary of the Interior that the prior entry or entries were made in good faith, were lost, forfeited or abandoned because of matters beyond his control, and that he has not speculated in his right nor committed fraud or attempted fraud in connection with such prior entry or entries. 47/

The burden of showing that the original entry was lost through no fault of the entryman is on the entryman requesting the second entry. 48/ Examples of excuses which will fulfill the requirements of section 182 include:

1. Abandonment of the homestead entry because of the inability to make a living thereon. 49/
2. Loss of a prior commuted entry solely because, in reliance upon ambiguous departmental regulations, the entryman cultivated only one-sixteenth (instead of one-eighth) of his former entry in the third year of entry. 50/
3. Extreme susceptibility to poison ivy when the original entry was infested with the plant. 51/

Under no circumstance may a homesteader who relinquishes his first location and who is otherwise eligible to make a second entry establish any rights under his second entry until he files a formal relinquishment as to the first entry. 52/

47/ 43 U.S.C. sec. 182 (1964).

48/ Robert L. Douglass, A-30582 (Interior Dec., September 16, 1966).

49/ George L. Hollis, 56 I.D. 340 (1938).

50/ John Robert Claus, Richard H. Yoder, 60 I.D. 457 (1951).

51/ James J. Kubal, 25 L.D. 132 (1897).

52/ Harold N. Aldrich, 73 I.D. 70 (1966)

The regulations 53/ require an applicant for a second entry to furnish the following facts upon which a determination as to eligibility will be made:

1. Date from which his first entry may be identified.
2. What examination of the land and what inquiries as to its character he made prior to filing his previous application for entry.
3. Whether he established residence upon the tract and if so, how long he lived there and what cultivation he effected.
4. What improvements he made upon the land.
5. The date of abandonment and the reason therefor and whether he ever executed a relinquishment of the entry.
6. What consideration, if any, he received for abandoning or relinquishing the entry; also, whether he sold the improvements on the tract, giving full details as to said sale, if any, including the date thereof and the consideration received.

5. Special Statutory Provisions

The Homestead Act includes other provisions which define the rights of particular persons to make entry. For instance, section 183 waives the age requirement for wartime veterans and section 184 provides that no distinction shall be made in the construction or execution of the homestead laws on account of the race or color of the applicant.

D. The Requirements for Applying for Entry

Anyone desiring to make a homestead entry is required to file an application in the proper land office and pay a fee. These requirements are set forth in section 162 which reads:

Any person applying to enter land under section 161 of this title shall first make and subscribe before the proper officer and file in the proper land office an affidavit that he or she is the head of a family, or is over twenty-one years of age, and that such application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, person, or corporation, and that he or she will faithfully and honestly endeavor to comply with all the requirements of laws as to settlement, residence, and

53/ 43 C.F.R. sec. 2211.5 (1968)

cultivation necessary to acquire title to the land applied for; that he or she is not acting as agent for any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that he or she does not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for himself, or herself, and that he or she has not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation, or syndicate whatsoever, by which the title which he or she might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person, except himself, or herself, and upon filing such affidavit with the officer designated by the Secretary of the Interior on payment of \$5 when the entry is of not more than eighty acres, and on the payment of \$10 when the entry is for more than eighty acres, he or she shall thereupon be permitted to enter the amount of land specified. 54/

The requirements of section 162 have been repeated and somewhat elaborated upon in the regulations. Section 2211.1-2 of the regulations states the general requirements for applications. 55/ In addition to the express requirements of

54/ 43 U.S.C. sec. 162 (1964).

55/ 43 C.F.R. sec. 2211.1-2 (1968). "(a) General requirements. Each application to enter and the statements accompanying it must recite all the facts necessary to show that the applicant is acquainted with the land; that the land is not, to the applicant's knowledge, either saline or mineral in character; that the applicant possesses all of the qualifications of a homestead entryman; that the application is honestly and in good faith made for the purpose of actual settlement and cultivation; and not for the benefit of any other person, persons, or corporations; that the applicant will faithfully and honestly endeavor to comply with the requirements of the law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that the applicant is not acting as the agent of any person, persons, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered or any

note continued

the statute, section 2211.1-2, requires the applicant to state he is acquainted with the land involved and that to the applicant's knowledge, the land is not saline or mineral.

The regulations also state:

A person who desires to enter public lands must file an application together with a petition on forms approved by the Director. However, if the lands described in the application have been already classified and open to homestead entry under the provisions of this part, no petition is required. 56/

The application and affidavit referred to in section 162 and in the regulations, is combined in a rather simple 2-page form known as "Homestead Entry Application". A copy of this form is included in Appendix B, page 1. The petition referred to in the previous quotation is a separate document which must be attached to the application if the lands have not been classified. 57/

In addition to the requirements described above, all applications must comply with Subpart 1821 of the regulations 58/ which contains the general provisions regarding the execution and filing of all types of forms under the public land laws of the United States. These requirements are:

1. Applications to make entry cannot be received by the manager of the land office outside of office hours, nor elsewhere than at his office. 59/

2. Completed forms and other land office filings must be made in the land office having jurisdiction over the land in question. 60/

part thereof; that the application is not made for the purpose of speculation, but in good faith to obtain a home for the applicant, and that the applicant has not directly or indirectly made, and will not make any agreement or contract in any way or manner with any person, or persons, corporation, or syndicate whatsoever by which the title he may acquire from the Government to the lands applied for shall inure, in whole or in part, to the benefit of any person except himself."

56/ 43 C.F.R. sec. 2211.1-1(a) (1968).

57/ For further discussion of classification requirements, see Chapter 6. A copy of this petition is included in Appendix B, p. B-2.

58/ 43 C.F.R. sec. 1821 (1968).

59/ 43 C.F.R. sec. 1821.2-1(b) (1968).

60/ 43 C.F.R. sec. 1821.2-1(c) (1968).

3. All applications must be executed not more than 10 days prior to filing. 61/

4. Applications will be considered to have been deposited within 10 days from the date of execution if such applications were deposited in the mails within this period of time. 62/

As to documents filed after the expiration of the specified period of time, the authorized officer with whom a document is to be filed has the power to waive the time requirements in the absence of a specific statute forbidding him to do so and if the rights of third parties have not intervened. This power is discretionary with the officer and if he determines that further consideration of the document would unduly interfere with the orderly conduct of business, he may refuse to consider the late application. 63/

Applications will be regarded as having been filed simultaneously if they are handed over the counter at the same time or if they are received in the same mail. 64/ If the simultaneous applications conflict, they will be included in a drawing which will determine the order in which the applications will be processed. 65/

E. Final Proof Requirements

After an entryman has applied for entry and entered the land, he must comply with certain additional requirements in order to obtain title. Once these conditions have been met, the homestead can submit his "final proof". He is then finally eligible to receive fee title to the land in the form of a patent when final proof is considered acceptable.

Section 164 establishes the general requirements which must be fulfilled before an entryman is eligible to receive

61/ 43 C.F.R. sec. 1821.2-2(a) (1968).

62/ 43 C.F.R. sec. 1821.2-2(c) (1968).

63/ 43 C.F.R. sec. 1821.2-2(g) (1968).

64/ 43 C.F.R. sec. 1821.2-3 (1968).

65/ 43 C.F.R. sec. 1821.2-3(b) (1968).

patent. 66/ Basically, the entryman must meet three separate requirements. First, a habitable house must have been constructed upon the land. Second, he must have actually resided upon the land for a term of three years; and third, a certain amount of the entry must have been cultivated.

The procedural steps involved in the filing of final proof will be discussed in a later portion of this chapter. The question at this point is what substantive acts must be performed by the entryman in order to successfully meet the prerequisites to obtaining fee title to the entered parcel.

1. What Constitutes Proof of a Habitable House?

Whether the entryman has fulfilled the requirements regarding construction of a habitable house is a factual determination which must be made on a case-by-case basis. No regulations have been promulgated defining what constitutes a habitable house. 67/

In Nicholson v. Wagoner, 68/ the Secretary of the Interior rejected the entryman's claim that a tarpaper shack constituted a habitable house by stating:

66/ Section 164 provides in part: "No certificate shall be given or patent issued therefor until the expiration of three years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry, or if he be dead his widow, or in the case of her death his heirs or devisee, or in case of a widow making such entry her heirs or devisee, in case of her death, proves by himself and by two credible witnesses that he, she, or they have a habitable house upon the land and have actually resided upon and cultivated the same for the term of three years succeeding the time of filing the affidavit and makes affidavit that no part of such land has been alienated, except as provided in section 174 of this title, and that he, she, or they will bear true allegiance to the Government of the United States, then in such case he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law"

67/ The regulations, 43 C.F.R. sec. 2211.2-1 (1968), state only that a habitable house must be constructed, but do not attempt to define the term.

68/ 44 L.D. 337 (1915).

(A)ppellant placed on the land a shack 12 x 14 feet, covered with boards and tar paper, with three windows, one door and no floor other than the ground upon which it was built; . . . (He built two more houses.) (T)hese two last mentioned houses, so to speak, were nothing other than a reconstruction of the first shack, the same material used in the original house serving for the purpose of the reconstruction (The only other improvement was) when he put a fence around the . . . shack to preserve it from future destruction by roaming cattle rubbing against it, on which account he was twice compelled to reconstruct the first shack as above stated. 69/

The Secretary concluded that it was:

(M)anifest that the house erected on the land was not fit for habitation even though appellant had desired to reside on the land . . . 70/

On the other hand, in the case of United States v. Victor H. Cooke, 71/ the Secretary found that there was a habitable house based on the following facts:

(A)ll the hearing witnesses testified that there were two "houses" on the land at that time. The first was a small one-room structure, 14' by 16' which had been either built or begun in 1939, and which was livable in early 1940, being completely enclosed, fitted with windows and doors, and having a floor. . . .

The second "house" was a sizable four-room structure, worth between \$500 and \$600. The excavation for this had been made in late 1939. . . . In 1941, the house had its window and door frames but as yet no windows or doors. In the field agent's photographs taken April 9, 1942, those sides of the house which appeared showed windows in three of the several frames, but no door. His pictures showed also a floor. . . .

The testimony of the hearing witnesses also bore on the habitability of these structures. All testified that in 1941 the small house had been occupied by a Mr. Deal, who with Mr. Cooke's assistance had farmed the entry that year. They said that Deal, his wife, and five children had all lived in the one-room house during the winter but that in the summer months they had their

69/ Id. at 338.

70/ Id. at 340.

71/ 59 I.D. 489 (1947).

Sleeping quarters in the big house. . . .

It seems clear, therefore, that, although at the offering of final proof in August 1941 the large house had not been completed and was then used only for summertime sleeping, there was nevertheless a habitable house on the entry, a house which, although rough and small, was even then serving as the habitation of a family of seven and had so served for almost a year. 72/

2. Satisfaction of the Residence Requirements

As noted in the quoted portion of section 164, 73/ the statute required that residence be established upon the land for a period of three years unless, as will be discussed in a later section of this chapter, a reduction in the requirements is allowed. In addition, section 169 provides that if the entryman fails to establish residence within six months after his entry or abandons the land for more than six months at any time before completing the three years of residence, the land reverts to the government. Section 169 contains a proviso permitting the Secretary of the Interior to extend the time for establishing residence to twelve months where climatic reasons, sickness or other unavoidable causes justify such an extension. 74/

72/ Id. at 495-96

73/ See n. 66 at 21 supra.

74/ 43 U.S.C. sec. 169 (1964). "If, at any time after the filing of the affidavit as required in section 162 of this title and before the expiration of the three years mentioned in section 164 of this title, it is proved, after due notice to the settler, to the satisfaction of the Secretary of the Interior or such officer as he may designate that the person having filed such affidavit has failed to establish residence within six months after the date of entry, or abandoned the land for more than six months at any time, then, and in that event, the land so entered shall revert to the Government: Provided, that the three years' period of residence herein fixed shall date from the time of establishing actual permanent residence upon the land: And provided further, that where there may be climatic reasons, sickness, or other unavoidable cause, the Secretary of the Interior or such officer as he may designate may, in his discretion, allow the settler twelve months from the date of filing in which to commence his residence on said land under such rules and regulations as he may prescribe."

The cases and administrative decisions have uniformly held that the entryman is required to show both actual residence on the land and a good faith intention to establish a permanent home for himself and his family. ^{75/} Under previous law, constructive residence could be acquired during a period of time reasonably required to build a habitable home on the property. However, section 169 now requires actual residence. Therefore, the period of time, which under section 169 cannot be more than twelve months, required to build a dwelling or to carry out other acts preparatory to establishing residence cannot be counted towards the required three years of residence. Residence begins only when the entryman moves onto the land. ^{76/}

There are numerous court cases and administrative decisions which discuss whether a certain fact situation demonstrates the entryman's good faith and intention of establishing a permanent home. It is quite clear that the maintenance of another residence off the homestead entry will cause the Department of the Interior to question whether the homestead residence was in fact maintained in good faith. In one case, the Secretary held that the personal presence of the entryman on the land is not sufficient to comply with the residence requirements of the law if he maintains a family residence elsewhere. The entryman, Mr. Chainey, resided on the land but his family lived in Coeur d'Alene, a nearby town. ^{77/} Generally, the Secretary has interpreted the homestead law to require that the entryman's family reside on the land with the entryman. ^{78/}

However, when the situation is reversed and the entryman's family is living on the homestead while the entryman is living elsewhere, some decisions have held that a presumption of residence is established. The rationale is that the homestead entryman may leave the property to provide for his family and to earn money with which to develop the homestead and still comply with the residence requirements. ^{79/}

^{75/} Great Northern Ry v. Hower, 236 U.S. 702 (1915); Whaley v. Northern Pac. Ry., 167 F. 664 (C.C.D. Mont. 1908); United States v. Richards 149 F. 443 (D. Neb. 1906).

^{76/} John W. Iley, 43 L.D. 231 (1914). It should be noted that the entryman need not reside in his habitable house in order to establish residence. If he lives in a tent on the land while building his house this period of time is counted as residence. United States v. Cooke, 59 I.D. 489 (1947).

^{77/} Benjamin Chainey, 42 L.D. 510 (1913).

^{78/} However, see United States v. Cooke, 59 I.D. 489 (1947), where it is stated that if good cause for the absence of the entryman's family can be shown, the presumption of bad faith may be overcome.

^{79/} Thrasher v. Mahoney, 8 L.D. 626 (1889); Clark v. Lawson, note continued

Although leaves of absence from the homestead are permitted under some circumstances, the decisions are quite clear that sporadic visits to the property do not constitute residence. ^{80/}

As noted previously, section 169 generally requires that residence be established within six months after entry. However, the Secretary of the Interior may, in his discretion, allow an additional six months for climatic reasons, sickness, or other unavoidable cause. When an application for an extension of time is made, the application must include statements of the entryman and two witnesses acquainted with the facts setting forth in detail the grounds upon which the request for extension is based, including causes and the date when the claimant may reasonably expect to establish his residence. ^{81/}

The statute and the regulations do not give the Secretary any authority to extend the length of time for the establishment of residence beyond twelve months. ^{82/} The provisions of section 234, which grant to the Secretary the power to allow leaves of absence due to failure of crops, sickness, or unavoidable casualties, cannot be used to allow an entryman

2 L.D. 149 (1883). Of particular interest is the case of Harold Paul, 54 I.D. 426 (1934), which involved a policeman who resided in Los Angeles and retained his job while ostensibly establishing a homestead. In this case, the Assistant Secretary of the Interior held: "The mere fact, however, that the entryman retained his ownership of his former home, kept it furnished and used it as his dwelling place while engaged in his duties as a policeman which necessitated his personal presence in or near the city, does not prima facie show mala fides. The Department in a great number of cases has applied the rule that the entryman must maintain a residence on the homestead to the exclusion of a home elsewhere, but in examination of the facts in these cases will show that in the case of an entryman who is married, his family during the homestead period actually resided elsewhere than upon the homestead. (Citations omitted) Keeping a house in town, to which the family return (sic) from time to time, does not in itself prove want of good faith." Id. at 428.

^{80/} Johnson v. United States, 51 F. 2d 54 (10th Cir. 1931); United States v. Peterson, 34 F. 2d 245 (10th Cir. 1929).

^{81/} 43 C.F.R. sec. 2211.2-2(c) (1968).

^{82/} The case of Johnson v. Bundren, 48 L.D. 361 (1921), seems to cloud the issue of whether the Secretary of the Interior may grant the entryman a period of time longer than twelve months within which to establish his residence. In this case, there had been a two-year delay in establishing residence. In spite of this long delay, the decision still discusses whether the circumstances were such as to justify the delay.

more than twelve months to establish residence. The regulations 83/ hold that section 234 applies only to homesteaders who have established actual residence on the lands.

In one situation, residence on the land is not required. Under section 161, one owning and residing on a parcel of land not obtained under the homestead laws may enter land lying contiguous to his land up to an amount that will, when added to his other land, not exceed 160 acres. This type of entry should not be confused with the additional entries discussed in the next chapter. For the rules of additional entries to apply, the land already owned by the entrymen must have been obtained under the homestead laws, the entry of contiguous land is called an "adjoining entry". The residence requirements for an adjoining entry may be met by residence on the original parcel. 84/

Numerous cases have arisen in which the entryman has owned property not contiguous to but in the neighborhood of the homestead property or has purchased additional property after entry. Generally, the cases have been quite strict in requiring that the entryman establish residence on the homestead tract and not on any nearby piece of property. The cases have so held, even when a residence had already been constructed on the other property and insistence on the residence requirement would require the entryman to abandon his present home and construct a new home. 85/

A hired hand residing on the land will not be deemed to fulfill the residence requirements for the purposes of the Homestead Act for either the entryman or the hired hand. Therefore, if the original settler abandons the entry and the former hired hand remains on the land, with intent to homestead, residence for the latter begins only at the time of such abandonment. 86/

83/ 43 C.F.R. sec. 2211.2-2(e)(2) (1968).

84/ 43 C.F.R. sec. 2211.2-2(a) (1968); Carl A. Williams, 52 L.D. 472 (1928).

85/ Harley John Lammers, 60 I.D. 218 (1948); King v. Selstad, 60 I.D. 382 (1949). However, in the case of Gregory Schoen, 42 L.D. 540 (1913), the entryman attempted to establish residence on the homestead tract, but due to periodic flooding, he could not maintain a home. He therefore moved to a plat of private land adjacent to his entry. The Secretary upheld his final proof stating: "(A)bsence of a claimant from his homestead, under circumstances which render such absence practically compulsory, does not interrupt the continuity of residence established and maintained in good faith." Id. at 541.

86/ McDonald v. Jaramilla, 10 L.D. 276 (1890).

a. Reduction in Residence Requirements

Prior to the Act of June 6, 1912, 87/ it was totally within the discretion of the Commissioner of Public Lands to determine if an entryman was required to maintain residence upon the land for 12 months of each year, or if a reduction would be allowed due to climatic conditions. 88/ However, the present law expressly limits the permissible periods of absence. Section 164 provides that upon filing of a notice the entryman is entitled to a continuous leave of absence from the land for a period not exceeding five months in each year after establishing residence. This leave of absence provision is supplemented by section 231, which states:

. . . That the officer designated by the Secretary of the Interior . . . may, upon proper showing, upon application of the homesteader, and only for climatic conditions, which makes residence on the homestead for seven months in each year a hardship, reduce the term of residence to not more than six months in each year, over a period of four years, or to not more than five months each year over a period of five years, but the total residence required shall in no event exceed twenty-five months, not less than five of which shall be in each year. . . . 89/

The Secretary of the Interior has interpreted this provision to eliminate his discretionary power to reduce the required residence below five months even if climatic conditions make residence for a shorter period of time the only possibility. 90/

3. Leaves of Absence

Once residence has been established, section 234 provides that under such regulations as the Secretary may prescribe, an entryman, who, because of a total or partial destruction or failure of crops, sickness, or other unavoidable casualty, is unable to support himself and his family may be granted a leave of absence for a period not exceeding one year for each such occurrence. The section does not limit the number of times an entryman may apply for such relief, but does provide

87/ Ch. 153, 37 Stat. 123 (codified at 43 U.S.C. secs. 164, 169 and amending sec. 218).

88/ Joseph Rupley, 42 L.D. 143 (1913).

89/ 43 U.S.C. sec. 231 (1964).

90/ Charles S. Green, 49 L.D. 602 (1923).

that the time of actual absence will not be deducted from the residence required by the homestead laws.

The regulations 91/ require that the entryman file an application for such leave of absence corroborated by at least one witness. However, the Department of the Interior has not rigidly enforced the notice and application provisions of the regulations. In the case of George I. Thorne 92/ the entryman had not given notice to the local land office of his absence as required. The Secretary accepted the entryman's final proof stating:

This notice requirement, however, should not be inexorably applied. Its purpose is to assist the General Land Office in supervising pending homestead entries. Failure to file such notice on taking leave of absence may impose a heavier burden on the entryman on final proof in making a convincing showing as to his residence. But such a failure ought not, in the ordinary case, to be held to forfeit the entryman's privilege of taking proper leaves of absence. Consequently, if (the entryman) actually resides on the land 7 months each year for 3 years, this Department will hold that (the entryman) fulfilled the residence requirements of the homestead law. 93/

4. Cultivation Requirements

The final proof provisions of section 164 require cultivation of not less than one-sixteenth of the homestead entry beginning with the second year of the entry, and not less than one-eighth, beginning with the third year of the entry and until final proof. The regulations expand on the statutory provision in the following manner:

(a) For 3-year proof. (1) Cultivation of the land in a manner reasonably calculated to produce profitable results is required for a period of at least 2 years. This must consist of actual breaking of the soil, followed by planting, sowing of seed, tillage for a crop other than native grasses, and, in areas where rainfall is inadequate, the application of such amounts of water as may reasonably be required to produce a crop. However, tilling of the land, or other appropriate treatment, for the purpose of conserving the moisture with a view of making a profitable crop the succeeding year, will be deemed cultivation within the terms of the act

(without sowing of seed) where that manner of cultivation is necessary or generally followed in the locality.

(2) During the second year not less than one-sixteenth of the area entered must be actually cultivated, and during the third year, and until final proof, cultivation of not less than one-eighth must be had. 94/

The statute and regulations have been interpreted to require a good faith effort to raise an agricultural crop upon the homestead entry. The term "good faith" appears to be the overriding criterion. Theoretically, although some of the recent cases would seem to place some doubt on the accuracy of this statement, success is not necessary as long as the entryman has done all that a reasonable farmer would do in the area of the entry in order to successfully raise an agricultural crop. 95/

a. The Length of Time That Cultivation Must Continue

Section 164 prescribes that the entryman must cultivate one-sixteenth of the land during the second year after entry and one-eighth during the third year and until final proof. If final proof is not filed until the fifth year, one-eighth of the land must be cultivated during the third, fourth and fifth years. Failure by the entryman to cultivate during all such years will result in cancellation of the entry. 96/ If final proof is not filed until after the expiration of five years, 97/ the entryman need only show that he cultivated the land through the fifth year. For example, if proof is not

94/ 43 C.F.R. sec. 2211.2-3 (1968).

95/ Claude E. Crumb, 62 I.D. 99 (1955). See also the cases of Reas v. Ludlow, 22 L.D. 205, 207 (1896) where it is stated that the mere planting of a crop with knowledge that it will be destroyed by stock running at large over the land does not constitute compliance with the law; Charles Edmund Bemis, 48 L.D. 605 (1922), where it is noted that while successful or remunerative cultivation is not absolutely necessary, the degree of good faith displayed by the entryman must necessarily be measured by the extent to which he tried to produce a productive or profitable crop; and United States v. Charles E. Stewart, A-28966 (Interior Dec., September 25, 1962), rev'd on other grounds, 238 F. supp. 831 (D. Nev. 1965), where it is stated that the ground must be kept in a state favorable for the growth of crops, otherwise, a homestead patent could properly be issued for land suitable only for a gravel pit.

96/ Clarence A. Beichner, A-30051 (Interior Dec., April 10, 1964).

97/ In such a case the patent would be requested under the equitable adjudication procedure, 43 U.S.C. sec. 1161 (1964); 43 C.F.R. sec. 2011.1-1 (1968).

91/ 43 C.F.R. sec. 2211.2-3(e)(2) (1968).

92/ 57 L.D. 185 (1940).

93/ Id. at 188.

filed until nine years after entry, cultivation would not have to be demonstrated for years six through nine. 98/ Apparently, this rule is based on the fact that the homestead entry technically expires at the end of the five year period. 99/ Therefore, further compliance with the statutes and regulations is not required.

b. The Types of Activity that Constitute Cultivation

Until 1924, use of a homestead entry for grazing livestock was a proper agricultural use and would satisfy the cultivation requirements. 100/ However, the passage of the Stock Raising Homestead Act 101/ established a specific law for obtaining title to land for the purposes of raising stock and in 1924 the Department of the Interior altered its regulation to do away with the right to use a general homestead entry for such purpose. 102/

It is quite clear that cultivation requires the breaking and tilling of the land. Timber culture, terpentine production or other forms of activity which involve using the native trees is not considered cultivation. 103/ In the case of Lauren M. Lucas, 104/ the Director of the Bureau of Land Management stated:

The courts have held that cultivation is ordinarily understood to mean wheat, corn, potatoes or other annual crops which are cultivated and harvested during a single growing season. It does not apply to the planting of timber seeds or cuttings. 105/

98/ Edgar A. Alder, A-30077 (Interior Dec., April 6, 1964).

99/ 43 U.S.C. sec. 161 (1964).

100/ George Hathaway, 38 L.D. 33 (1909); Benigno Murillo, 52 L.D. 339 (1928).

101/ Act of December 29, 1916, ch. 9, 39 Stat. 862 (codified as amended at 43 U.S.C. secs. 291-301 (1964)).

102/ Benigno Murillo, 52 L.D. 339 (1928).

103/ John T. Wooten, 5 L.D. 389 (1887).

104/ Oregon 09887 (B.L.M. Dec., December 7, 1960).

105/ Id. at 1; See also Herman H. Moore, Sacramento 049601 (B.L.M. Dec., February 8, 1956), where it is stated: "the growing of Christmas trees cannot be considered as cultivation under the Homestead Law, and for this reason alone the application could have properly been rejected."

The current version of a form letter sent by the Sacramento, California Office, Bureau of Land Management, in response to inquiries about the homestead laws, states that orchards do not qualify as agriculture under the homestead laws. 106/ The letter is in direct contradiction to the case of Ferdinand J. Clifford, 107/ where it is stated:

The raising of fruit is strictly a horticultural rather than an agricultural use of land, but it is in the broad sense of the word an agricultural employment of the land, and the development of a good orchard, and the planting thereof, is such cultivation to agricultural crops as is within the contemplation and purview of the homestead law . . . 108/

Several cases have held that the cultivation requirement is mandatory and cannot be excused even if a land office employee furnishes an entryman erroneous information. 109/ In the case of United States v. Richard Dean Lance, 110/ the local agent of the Bureau of Land Management specifically told the entryman that since he had attempted to construct the well and had failed, he did not have to continue futile acts of cultivation. In spite of his reliance on this information, the entry was cancelled for lack of cultivation.

c. Cultivation Requirements in Arid Regions

Many years ago, the most desirable agricultural land was settled and patented. Most recent homestead entries have been in arid or semiarid regions of the West. As a result, the most recent administrative decisions dealing with the cultivation requirement have centered around the question of irrigation. It has been the Department of the Interior's contention that lack of irrigation in an arid region is a prima facie indication of bad faith on the part of the entryman since, without irrigation, there is no reasonable possibility that a successful crop will be produced. Several recent cases demonstrate the reasoning used by the Department to determine if the required cultivation has been carried out in a good faith manner.

106/ A copy of this letter is included in Appendix D, p. D-10

107/ 42 L.D. 535 (1913).

108/ Id. at 536.

109/ Jess H. Nicholas, Jr., A-30065 (Oct. 13, 1964); United States v. Richard Dean Lance, 73 I.D. 218 (1966).

110/ 73 I.D. 218 (1966).

Stewart v. Penny 111/ involved the attempted cultivation of a Nevada land entry by a man who was 78 years old at the time of submitting final proof. In 1953, Mr. Stewart filed an application for a homestead entry with the Reno land office. A classification survey was made and it was determined that the land was more valuable for homestead entry than for grazing purposes. Therefore, the entry was permitted, but on the specific condition that the entryman submit to the manager of the land office evidence of filing of a water right application with the State Engineer of Nevada for the lands allowed. Failure to submit such evidence would subject the entry to cancellation. Stewart submitted evidence of a water right (one which, on its face, was insufficient to irrigate one-eighth of the land in question) and the entry was allowed in 1955. Several years later, Stewart filed final proof. The Bureau of Land Management responded by filing a contest alleging that a lack of irrigation demonstrated that there had not been a good faith effort to cultivate the land. A hearing examiner received testimony on the question of good faith cultivation and found that the entryman had cultivated the necessary one-eighth of the land and had done so in a good faith manner. On appeal from the hearing examiner's decision, the Director of the Bureau of Land Management reversed the hearing examiner, using the following reasoning:

At the outset we must note that the allowance of this entry in 1955 without requiring the entryman to show a water right sufficient to cultivate at least 1/8th of the land in the entry, or 15 acres, was erroneous. However, the fact remains that the entry was allowed under the general Homestead laws. Thereafter, in order to establish his right to patent, the entryman is required to show compliance only with the pertinent provisions thereof, 43 U.S.C. 164 and the applicable regulations, 43 C.F.R. Part 166.

Surely, after once attempting to raise a crop the entryman was fully aware that further plantings, without the benefit of irrigation, would be abject failures. Even at the very moment of entry, he knew that any attempt at cultivation would be a failure unless he was able to and prepared to irrigate. Yet notwithstanding this knowledge he set about to create but an illusion of compliance with the positive mandates of the homestead law in regard to cultivation--knowing full well that such attempts at husbandry were foredoomed to disaster. . . . 112/

111/ 238 F. Supp. 821 (D. Nev. 1965).

112/ Id. at 824-25 n. 1.

The entryman, Mr. Stewart, then appealed his case to the Secretary of the Interior. The Secretary affirmed the decision of the Director, but did so on entirely different grounds. In his opinion the Secretary stated:

. . . I am unable to find, on the basis of the evidence adduced at the hearing, that there was a total want of the type of cultivation reasonably calculated to produce profitable results. If this were the only pertinent factor in the case, it would be necessary to remand the case for the taking of further evidence. However, I believe that this is unnecessary since, after careful examination of the evidence, I am obliged to conclude that the entryman did not apply the processes of cultivation which he employed to the required 1/8th of the acreage of the entry so that he failed to meet the cultivation requirement of the homestead law for this reason. 113/

As can be seen, the three administrative hearings resulted in three different conclusions. Therefore, the district court, in its decision, thoroughly discussed both the question of good faith and the quantity of land cultivated by the entryman. In discussing the question of good faith, the court adopted the conclusion of the Hearing Examiner that:

"(O)nce an applicant for a homestead entry has made a showing of water right sufficient to justify a classification that the land is suitable for such entry and his entry is allowed, then the requirements of the homestead laws as set forth in 43 C.F.R. 166 govern and the Bureau of Land Management is precluded from again questioning the sufficiency of the water." 114/

The court stated that it believed that the conclusion of the hearing examiner was correct, and further that:

(W)e believe the record cries for affirmance of these conclusions. Any other holding would be a fraud on the entryman. . . . 115/

After finding that the Department of the Interior could no longer question the sufficiency of the water, the court held that in all other aspects the entryman had shown a good faith effort to produce an agricultural crop. The court also overruled the Secretary on the question of the amount of acreage cultivated, and reversed the Secretary's decision cancelling the entry.

The Stewart case is extremely important. The Bureau of

113/ Id. at 825-26 n. 2.
114/ Id. at 828.
115/ Id.

Land Management has been requiring that adequate water be developed on semiarid homestead entries to reasonably assure the cultivation of successful crop. ^{116/} When an applicant requests land be classified for homestead entry, it has been the policy of the BLM to require the applicant to produce evidence of a water right before it will permanently classify the land for agricultural use. The Stewart case seems to hold that if the BLM accepts a given water right and allows entry of the land, it is thereby estopped from later rejecting final proof on the basis that water, in addition to the amount shown to be available at the time of entry, is needed, or on the basis that the failure to apply such additional water shows bad faith on the part of the entryman.

Since the Stewart decision, several cases have been decided by the Secretary dealing with other semiarid land entries. In the case of United States v. Cecil R. Reed, ^{117/} the Secretary upheld a decision of the Director cancelling an entry based on unsatisfactory cultivation. The opinion states:

For cultivation to satisfy the requirements of the homestead laws it must be bona fide and not a mere pretense. Ingelev J. Glomset, 36 L.D. 255 (1907). While the Department has never attempted to lay down a fixed rule as to what constitutes satisfactory cultivation, it has repeatedly held that the satisfactory cultivation must include such acts and be done in such a manner as to be reasonably calculated to produce profitable results. United States v. Wilma Oldaker, A-30378 (August 26, 1965); Jess H. Nicholas, Jr., A-30065 (October 13, 1964). When the homestead entry consists of land which is arid or semiarid in character, as it is here, artificial irrigation is necessary for cultivation and production of a crop except possibly in a year of abnormal rainfall. Any cultivation undertaken without appropriate irrigation cannot be considered to be bona fide since it cannot be calculated to produce a profitable result. Cf. Charles Edmund Bemis, 48 L.D. 605 (1922), and see also United States v. Charles E. Stewart, A-28966 (September 25, 1962) reversed on another ground, Stewart v. Penny, Supra. ^{118/}

^{116/} See 43 C.F.R. sec. 2211.2-3(a) (1968), quoted supra pages 28-29.

^{117/} A-30354 (Interior Dec., Sept. 29, 1965), aff'd, Reed v. Udall, Civil No. 1784 (D. Nev., Dec. 19, 1967).

^{118/} Id. at 6 (footnote omitted).

This case was decided after the court decision in Stewart v. Penny, but does not state whether the classification and entry were allowed upon the condition that a water right be obtained. However, the case is distinguishable from the Stewart case, as in Stewart the entryman developed what later turned out to be an inadequate water supply system, but a system which was approved by the Bureau of Land Management for purposes of classifying the land for agricultural use. In the Reed case, the entrymen did not attempt to construct an irrigation system of any kind.

The next significant case on this subject was United States v. Richard Dean Lance. ^{119/} In that case, the entryman obtained a water right and attempted to develop it by drilling two wells. Both attempts resulted in dry holes, and the entryman was told by a well driller that future attempts to drill would be equally unsuccessful due to subterranean cavernous conditions. The entryman relayed this information to the Bureau of Land Management office and was apparently told that since he had attempted in good faith to successfully cultivate the land and had failed, he had complied satisfactorily with the law and would not have to continue futile attempts at cultivation. Several years later when he filed final proof, it was rejected for lack of cultivation. The Secretary stated in his opinion on the appeal:

I am unable to find in the record in this case a rational basis for construing the appellant's efforts as substantial compliance with the cultivation requirements of the homestead law. The failure to develop a water supply was not a failure to meet a technical requirement of the law. It was, in effect, complete failure to achieve the primary purpose for which the entry was allowed, the agricultural development of the land, and, on the basis alone of failure to comply substantially with the cultivation requirements of the law, the appellant's request for equitable adjudication was properly denied, regardless of the reasons for the non-compliance. . . .

In view of these findings it is not necessary to determine the extent of the appellant's good faith or the degree to which his failure to develop a water supply may be attributed to circumstances beyond his control. . . .

In ruling against the appellant we do not intend to imply that he was attempting to evade the requirements of the law or otherwise act

^{119/} 73 I.D. 218 (1966), appeal dismissed, Lance v. Udall, Civil No. 1864 (D. Nev., Jan. 23, 1968).

in bad faith. The fact simply is that homesteading on desert land is a harsh proposition, demanding rigorous efforts. That an entryman should fail is not a reflection on him. On the other hand it does not entitle him to the rewards obtainable only for the successful compliance with the requirements of the law. 120/

A very recent case on this subject is United States v. Alvin M. May. 121/ Again, in this case, it is not clear whether the entryman had been required to obtain a water right prior to his entry being allowed. The entryman made no attempt to develop an irrigation source, but did faithfully plant the required number of acres for the required length of time. His entry was cancelled based on a finding that the cultivation was not such as would reasonably be expected to produce a successful crop. The Secretary stated:

The examiner came closer to the mark when he said that appellant sowed his crop each year "with the expectation, however small, that the Gods would smile on him insofar as precipitation was concerned that year and that he would reap a bountiful harvest" (emphasis added). The expectation was indeed small -- not one year in the 5-year life of the entry and only one year in seven, counting the two years after the entry expired, did the Gods smile on appellant. At those odds we cannot see how it can be concluded that appellant's efforts were reasonably calculated to produce a successful crop. To till soil and plant seed each year with the knowledge that a crop will mature only if the rainfall is above normal is not, to our way of thinking, a reasonable attempt at cultivation. It is a pure gamble against substantial odds. 122/

These four cases paint a somewhat confusing picture of what criteria will be used to determine if the cultivation requirement has been fulfilled. It is clear that in arid and semiarid land, lack of irrigation will raise a presumption of bad faith and improper cultivation. The Stewart case seems to indicate that this presumption of bad faith is overcome if the land is classified for homestead entry on the basis of a water right presented by the prospective entryman. In such a case, the Department cannot base a finding of bad faith upon the failure of the entryman to place more water on the land than the amount shown on the original water right. However, the Lance case seems to add one additional

caveat to this statement. If, due to natural geologic conditions, the entryman is unsuccessful in obtaining any water and is, therefore, unable to cultivate the land, the entry may be cancelled. This latter case seems to shed some doubt upon the accuracy of the statement that success is not required to fulfill the requirements of cultivation.

The ramifications of the Lance case create a somewhat anomalous situation. As will be discussed in the classification chapter, the Bureau of Land Management may not reclassify land once an entry has been made. 123/ By cancelling the entry as the Bureau of Land Management did in the Lance case, the Bureau in fact reclassified the land after entry. As stated previously, the regulations seem only to require a good faith attempt by the entryman to cultivate the land, but the Lance case seems to stand for the proposition that if events beyond his control make such cultivation impossible, the final proof will be rejected even in the absence of bad faith or fraud.

d. Reductions in Cultivation Requirements

The same proviso in section 164 which sets forth the cultivation requirements authorizes the Secretary of the Interior to reduce the requirements under rules and regulations prescribed by him.

The Secretary has promulgated the following regulations regarding such reductions in requirements:

(b) Reduction of requirements. (1) The requirements as to cultivation may be reduced if the land entered is so hilly or rough, the soil so alkaline, compact, sandy, or swampy, or the precipitation of moisture so light as not to make cultivation of the required amounts practicable, or if the land is generally valuable only for grazing. When action is taken on an application for a reduction of the required area of cultivation, consideration will be given all the attendant facts and circumstances, and if it appears that at the date of the initiation of the claim the conditions were such as to indicate to a prudent person that cultivation of the required acreage was not reasonably practicable or that there was lack of good faith on the part of the claimant in making the entry, the application will be subject to rejection. . . .

(2) A reduction may be allowed also if the entryman, after making entry and establishing residence, has met with misfortune which

120/ Id. at 227-28 (footnote omitted).

121/ A-30675 (Interior Dec., July 25, 1968).

122/ Id. at 9.

123/ See Chapter 6, Pages 275-276.

renders him reasonably unable to cultivate the prescribed area. In this class of cases an application for reduction is not to be filed, but notice of the misfortune and of its nature must be submitted to the manager of the land office, within 60 days after its occurrence; upon satisfactory proof regarding the misfortune at the time of submitting final proof a reduction in area of cultivation during the period of disability following the misfortune may be permitted. 124/

The provision relating to a prudent person's awareness of the conditions rendering cultivation difficult or impossible has made paragraph (b) (1) almost a dead letter, as the cases have consistently found that a prudent person should have discovered the problem prior to entry. For example, in the case of Donald M. Fell, 125/ the entryman asserted that he had examined the land before entry and had dug numerous postholes in an attempt to discover rock which would preclude clearing and cultivation. He mistakenly assumed that the land would support cultivation. However, after entry, he found that the underlying rock was so extensive that it would hamper even a disk operation. The Secretary of the Interior rejected Fell's request for a reduction in cultivation on the ground that the entryman could have as easily ascertained whether the land was suitable for agricultural development before he made his entry as afterwards.

The case of Grady Allen Phillips 126/ is one of the few cases where a reduction in cultivation was allowed. The entryman settled upon land which would require substantial clearing before cultivation could commence. He hired several bulldozers to clear the land of the stumps remaining after the trees were cut. The bulldozers not only removed the stumps but also all topsoil in the immediate vicinity. Therefore, the entryman instituted an alternative procedure of pulling the stumps individually, thereby saving the topsoil. This rendered the clearing operation much slower but retained the soil necessary for proper cultivation.

At the end of the statutory life of his entry the entryman had only been able to clear and cultivate three and three quarters acres of his 80 acre entry. The entryman requested

124/ 43 C.F.R. sec. 2211.2-3 (1968).

125/ A-30862 (Interior Dec., February 21, 1968).

126/ A-24188 (Interior Dec., February 26, 1946).

a reduction in cultivation, stating that ultimately he would be able to cultivate the entire cultivable area of the entry but this would take several additional years due to the slow process of clearing and preparing the soil. The Secretary granted the reduction stating that the entryman had demonstrated good husbandry practices in an effort to combat difficulties met in a good faith effort to comply with the law.

The case of Claude E. Halstead 127/ holds that a reduction will not be allowed merely because the portion of the entry which the entryman desires to cultivate is, due to natural circumstances, not subject to cultivation. As long as there is more than enough land available to satisfy the cultivation requirements, cultivation of the required acreage must be completed. 128/

The types of misfortune covered by paragraph (b) (2) are: bad fortune or luck, calamity, or an evil accident, disaster, mishap, or mischance. 129/ It connotes the intrusion of some unforeseeable and unfortunate event which prevents the entryman from carrying out the program of cultivation prescribed by the statute. For example, the unavailability of tractors and farm machinery due to wartime shortages was considered a valid excuse under this regulation. 130/ However, the unavailability of a bulldozer during nonwar periods was held in Henry O. Hanson 131/ not to be the kind of misfortune covered by the regulation.

Paragraph (b) (2) of the regulations requires that notice of a misfortune be filed within 60 days of its occurrence. The cases have virtually done away with this requirement. In Earl R. Barnard, 132/ the Secretary held:

(The department) has generally considered the merits of a request for reduction in cultivation, although not timely filed, in those cases in which it has appeared that, but for the failure to furnish timely

127/ A-25723 (Interior Dec., November 29, 1949).

128/ See also Donald M. Fell, A-30862 (Interior Dec., February 21, 1968).

129/ Henry O. Hanson, A-25797 (Interior Dec., March 14, 1950).

130/ Frank L. Price, A-23982 (Interior Dec., June 5, 1945).

131/ A-25797 (Interior Dec., March 14, 1950).

132/ A-30920 (Interior Dec., May 27, 1968).

notice of misfortune, the entryman would have been entitled to the relief requested and, with the aid of such relief, would have satisfied all of the requirements to obtain patent. . . . 133/

e. Relinquishment of a Portion of the Entry to Satisfy Cultivation Requirements

If at the time of offering final proof, the entryman is unable to demonstrate that he has cultivated the required one-eighth of the entry, and is unable to show that a reduction in cultivation should be allowed, the Bureau of Land Management has permitted the entryman to relinquish a portion of his entry, thereby bringing the amount of land successfully cultivated up to one-eighth of the remaining portion of the entry. 134/ This procedure is, of course, available only if the entryman can show that he has met the cultivation requirements for the reduced entry for the required period of time. If no good faith cultivation has been carried out, the procedure would not be available.

5. Alienation

The provisions of section 162, in addition to establishing the procedural requirements for filing an entry application, require that the applicant file an affidavit stating:

(T)hat he or she has not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation, or syndicate whatsoever, by which the title which he or she might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person, except himself, or herself 135/

Upon filing final proof pursuant to the provisions of section 164, the entryman must prove by himself and by two credible witnesses that no part of the land has been alienated, except as permitted by section 174. Section 174 allows an alienation of a portion of the land in the following circumstances:

Any bona fide settler under preemption, the homestead, or other settlement law shall have the right to transfer, by warranty against his own acts, any portion of his claim

133/ Id. at 4.

134/ Thomas G. Simmons, Jr., A-30076 (Supp.) (Interior Dec., November 19, 1964); Donald M. Fell, A-30862, (Interior Dec., February 21, 1968).

135/ 43 U.S.C. sec. 162 (1964).

for church, cemetery, or school purposes, or for the right-of-way of railroads, telegraph, telephones, canals, reservoirs, or ditches, for irrigation or drainage across it; and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to his claim. 136/

The regulations expand on the statutory provisions concerning alienation and clarify the definition of the term "alienate". Section 2211.0-8(d) Title 43 of the Code of Federal Regulations reads as follows:

(d) Alienation of all or part of claim; mortgages; relinquishments. (1) The alienation of all or any part of the land embraced in a homestead prior to making proof, except for the public purposes mentioned in section 2288, Revised Statutes (43 U.S.C. 174), will prevent the entryman from making satisfactory proof, since he is required to swear that he has not alienated any part of the land except for the purposes mentioned in section 2288, Revised Statutes.

(2) A mortgage by the entryman prior to final proof for the purpose of securing money for improvements, or for any other purpose not inconsistent with good faith is not considered such an alienation of the land as will prevent him from submitting satisfactory proof. In such a case, however, should the entry be canceled for any reason prior to patent, the mortgagee would have no claim on the land or against the United States for the money loaned. A mortgagee who files notice of his interest in the land office becomes entitled to receive and be given the same notice of any contest or other proceeding thereafter had affecting the land which is required to be given the original entryman or claimant.

(3) The right of a homestead entryman to patent is not defeated by the alienation of all or part of the land embraced in his entry after the submission of final proof and prior to patent, provided the proof submitted is satisfactory. Such an alienation is, however, at the risk of the entryman, for if the reviewing officers of the Department of the Interior subsequently find the final proof so unsatisfactory that it must be wholly rejected and new proof

136/ 43 U.S.C. sec. 174 (1964).

required, the entryman cannot then truthfully make the nonalienation affidavit required by section 2291, Revised Statutes (43 U.S.C. 164), and his entry must in consequence be canceled. The purchaser takes no better title than the entryman had, and if the entry is canceled the purchaser's title must necessarily fail. 137/

The oath required by section 162 makes it impossible for the entryman to perfect his claim after alienation or the making of a contract requiring future alienation. If he so attempts, he is committing perjury 138/ and a prosecution of perjury may be maintained for the making of false oath before the receiver of the land office in regard to a homestead entry. 139/

The statute and cases are clear that an alienation of all or any portion of the homestead entry prior to the submission of final proof will defeat the right of an entryman to receive patent. 140/ As a general rule, the defect caused by a conveyance cannot be cured by a reconveyance. 141/ However, several cases have held that an innocent transfer which is immediately rescinded upon the acquisition of knowledge that the transfer was illegal, will not result in forfeiture of the entry. In the case of Blanchard v. Butler, 142/ the Secretary of the Interior stated:

The question thus presented is, whether one who is unwittingly inveigled into such a contract must be punished by forfeiture of the entry, though he repudiates the contract and offers full equitable compensation for its consideration as soon as its illegal character is known to him.

...

137/ 43 C.F.R. sec. 2211.0-8 (1968).

138/ Bailey v. Sanders, 228 U.S. 603 (1913).

139/ United States v. Smull, 236 U.S. 405 (1915).

140/ 43 U.S.C. sec. 162 (1964); Crawford v. Furguson, 10 L.D. 274 (1890).

141/ See note 138, *supra*.

142/ 37 L.D. 677 (1909).

Viewed also from the purpose of the provision in the homestead act prohibiting contracts of this kind, it is apparent that recognition of the right of rescission is in furtherance of the purpose of the act. To refuse it and close the door of repentance to one ignorantly making such contract is to put him under heavy bond to be silent, abide, and perform it. . . . 143/

In the case of George F. Bixler, 144/ the entryman and a third party traded lands where both parties thought it was legal, due to a false impression that all requirements for patent had been fulfilled. In this case, the Secretary stated:

While ignorance of the law does not excuse one from the legal consequences of his wilful act, the object and purposes of the homestead law would be largely frustrated if an entryman acting innocently and in good faith might not be relieved by the Department, the only tribunal having jurisdiction in the premises, from his honest mistake. The law was not designed to oppress the innocent or take from them the fruits of their years of labor, but to punish the guilty; and the Department has unquestioned power and authority to do justice to the Government's beneficiaries, certainly in a case of this kind where there is no adverse interest or claim. . . . 145/

The law not only forbids alienation of all or a portion of the premises, but also prohibits the creation of a contract for the future conveyance of the homestead upon receipt of a patent by the entryman. The forbidden agreement need not be in writing nor of sufficient form or of a nature to be enforced; but it is sufficient that the minds of the parties have met definitely, so there was a mutual consent that when the applicant acquired title, it should inure to the benefit of the other. 146/

In addition to holding that the contract to convey need not meet all the technical requirements, such as the statute of frauds, the decisions have also held that such an agree-

143/ Id. at 678-79.

144/ 40 L.D. 79 (1911).

145/ Id. at 82.

146/ United States v. Richards, 149 F. 443 (D. Neb. 1906).

ment is absolutely void as an illegal contract designed to commit a fraud upon the United States Government. 147/ In spite of the fact that the contract is void and unenforceable, the decisions have held that the execution of such an agreement requires that the entry be canceled. The decisions reason that although the agreement may not be enforceable in a court of law, the entryman could voluntarily carry it out. 148/

As is true with regard to a transfer prior to submission of final proof, the execution of an agreement for the future conveyance of property cannot normally be rescinded to remove its illegal taint. However, the cases cited above which deal with an innocent mistake permitting the Secretary to ignore the violation are also true in the case of contracts for future conveyance. 149/

Section 162 is not violated by a conveyance of a water right. 150/ Nor is it violated by the fact that the applicant has promised to concede a right-of-way over the premises for a neighborhood road. 151/ In these cases, the courts have held that the transfers were not the type prohibited by the law but were in fact designed to increase the value of the entries or were such that were favored or encouraged not only by Congressional legislation, but by public policy.

In addition to requiring the entryman to state he has not alienated the land, section 162 requires him to state that he is not entering the land for the purpose of speculation. In interpreting this provision of the statute, the courts have stated:

This provision . . . was not intended to limit the homesteader's dominion over the land after he has complied with the provisions of the homestead law, made his final proof, and acquired title. It is only intended to prohibit his entering the land under an agreement whereby he is acting for another. He may acquire valid title . . . with a view of disposing of the same after he has completed the purchase, provided that at and before the time of completing such purchase' . . .

147/ Howard v. Stanolind Oil & Gas Co., 197 Okl. 269, 169 P. 2d 737 (1946); Harris v. McCrary, 17 Idaho 300, 105 P. 558 (1909).

148/ Molinari v. Scolary, 15 L.D. 201 (1892).

149/ George F. Bixler, 40 L.D. 79 (1911).

150/ Mt. Carmel Fruit Co. v. Webster, 140 Cal. 183, 73 P. 826 (1903).

151/ United States v. Reed, 28 F. 482 (C.C.D. Ore. 1886).

he has not entered into an agreement with another whereby such other should receive any of the benefit of such purchase. 152/

6. The Effect of a Change in Entryman's Status on Final Proof

The marriage or insanity of an entryman or entrywoman creates certain rights and duties which change the basic final proof requirements of the homestead law.

a. Marriage of an Entryman to an Entrywoman

Section 167 describes the effect marriage of an entryman to an entrywoman will have on their entries. It provides:

The marriage of a homestead entryman to a homestead entrywoman after each shall have fulfilled the requirements of the homestead law for one year next preceding such marriage shall not impair the right of either to a patent, but the husband shall elect, under rules and regulations prescribed by the Secretary of the Interior, on which of the two entries the home shall thereafter be made, and residence thereon by the husband and wife shall constitute a compliance with the residence requirements of each entry 153/

This self-explanatory law was apparently passed to eliminate the situation where marriage was being postponed merely to receive patent for more land than would otherwise be obtainable.

b. Marriage of an Entrywoman to an Alien

Section 168 states:

Any female citizen of the United States who has initiated a claim to a tract of public land under any of the laws applicable thereto, and who thereafter has complied with all the conditions as to the acquisition of title to such land prescribed by the public land laws of the United States, shall, notwithstanding her intermarriage with an alien, who is entitled to become a citizen of the United States, be entitled to a certificate or patent to such entry equally as though she had remained

152/ United States v. Richards, 149 F. 443, 451 (D. Neb. 1906).

153/ 43 U.S.C. sec. 167 (1964).

unmarried or had married an American citizen. 154/

This provision only applies to a woman who marries an alien eligible to become a citizen of the United States. The provisions of the Act of June 27, 1952 155/ provide that a woman who marries an alien not eligible to obtain citizenship shall lose her American citizenship. This being the case, an entrywoman who marries an alien not eligible for citizenship would not be a citizen at the time of final proof and would therefore not be eligible to receive a patent. 156/

c. Insanity

Section 172 waives all final proof requirements for one who becomes insane after settlement upon the land, and permits his legal guardian to submit final proof on his behalf.

The regulations relating to section 172 state:

Neither residence nor cultivation by an insane homestead entryman is necessary after he becomes insane, if such entryman made entry and established residence before he became insane and complied with the requirements of the law up to the time his insanity began. Proof on the entry may be submitted by his duly appointed guardian or committee. However, if the entryman regains his sanity before the expiration of 3 years after the date of the entry, he is required to reestablish residence on the land and comply with the law; and he must himself submit proof unless the unsoundness of mind recurs. 157/

This regulation seems to imply that proof may not be filed by the entryman's guardian until the expiration of three years. Although it is unclear, it appears that an entryman who regains his sanity before the expiration of three years must only fulfill the requirements until he files proof at the ex-

154/ 43 U.S.C. sec. 168 (1964).

155/ Ch. 477, sec. 324, 66 Stat. 246 (codified at 8 U.S.C. sec. 1435 (1964)).

156/ See the provisions of Section 164 which require that at final proof it be shown that the entryman is a citizen of the United States.

157/ 43 C.F.R. sec. 2211.0-6(f) (1968).

piration of three years or later. It does not appear to be the intent of this section to require an entryman who regains his sanity to comply with the residence and cultivation requirements for a period of time ending with the expiration of the five-year life of the entry.

7. The Effect of Military Service on Residence and Cultivation Requirements.

Over the years, numerous statutes have been passed by Congress to benefit homestead entrymen who have served in the military. Most of these enactments deal with service during a particular time of war; and, as a result, have, with the passage of time, been relegated to a position of historical interest only. 158/

This discussion will deal only with those portions of the Soldier's and Sailor's Relief Act of 1940 concerned with homestead entrymen 159/ and the Act of September 27, 1944, 160/ as amended. The Soldier's and Sailor's Civil Relief Act of 1940 applies to all members of the armed forces, whether they served in time of war or time of peace. The 1944 Act applies to veterans of World War II and the Korean conflict. Only these acts are being discussed since entries by veterans of all earlier wars, including World War I, are of rapidly diminishing importance.

a. The 1944 Act

Section 279 provides that persons who served in the armed forces between September 16, 1940 and the end of the Korean War and who make a homestead entry after discharge may have their period of service, up to a maximum of two years, credited towards the residence and cultivation requirements for their homestead. 161/ Section 280 provides that the surviving spouse or minor children of a veteran are entitled

158/ 43 C.F.R. Sec. 2033.0-3(b) (1968) lists the statutes which are still in existence but refer to wars prior to World War II. The list includes statutes which confer benefits on veterans of certain Indian wars (43 U.S.C. sec. 243 (1964)), veterans of the Civil War (43 U.S.C. sec. 272 (1964)), veterans of the war with Spain and the suppression of the Philippine Insurrection (43 U.S.C. secs. 240, 271, 272 (1964)), and of the Mexican border operations and World War I (43 U.S.C. sec. 272(a) (1964)).

159/ Act of Oct. 17, 1940, ch. 888, secs. 501-503, 54 Stat. 1178 (codified at 50 U.S.C. App. secs. 561-563 (1964)).

160/ Ch. 421, 58 Stat. 747 (codified as amended at 43 U.S.C. secs. 279-284 (1964)).

161/ 43 U.S.C. sec. 279 (1964). "Any person who has served in the military or naval forces of the United States for a per-

note continued

to the credits he would have received under section 279 had he lived. 162/

The regulations of the Department of the Interior 163/ compute the homestead residence period required of the quali-

iod of at least ninety days at any time on or after September 16, 1940, and prior to the termination of the Korean conflict as determined by Presidential proclamation or concurrent resolution of the Congress, and is honorably discharged from the military or naval forces and who makes homestead entry subsequent to such discharge shall have the period of such service, not exceeding two years, construed to be equivalent to residence and cultivation upon the land for the same length of time. Credit shall be allowed for two years' service to any person who has served in the military or naval forces of the United States during the above period (1) if such person is discharged on account of wounds received or disability incurred during the above period in the line of duty, or (2) if such person is regularly discharged and subsequently is furnished hospitalization or is awarded compensation by the Government on account of such wounds or disability. When the homestead entry is made by a husband or wife whose spouse is entitled to any service credit under this section, such credit shall, with the consent of the spouse entitled thereto, be available to the husband or wife making the entry, in addition to any service credit to which he or she individually may be entitled under this section. No patent shall issue to any such person who has not resided upon his homestead and otherwise complied with the provisions of the homestead laws for a period of at least one year: Provided, That such compliance shall include bona fide cultivation of at least one-eighth of the area entered under the homestead laws. . . ."

162/ 43 U.S.C. sec. 280 (1964). "The surviving spouse or the minor children, as hereinafter provided, shall be entitled (1) in case of the death of any person as the result of wounds received or disability incurred in line of duty while serving in the military or naval forces of the United States during the period specified in section 279 of this title, to credit for two years' residence and cultivation on a homestead entry, or (2) in the case of the death of any person after performing service that would be a basis for credit under section 279 of this title, to the amount of credit which would have been allowable to such person. The credit provided by this section shall be available to the surviving spouse, or, in the case of the death or marriage of the surviving spouse, to the minor children by a guardian duly appointed and officially accredited at the Department of the Interior. An entry made by such surviving spouse or guardian shall be subject to the provisions contained in section 279 of this title respecting compliance with the provisions of the homestead laws for a period of at least one year."

163/ 43 C.F.R. sec. 2033.1-3(a) (1)(i) (1968).

fying veteran in the following manner:

Number of months of service credit	Number of months of residence required during the first 3 years after entry		
	1 year	A second year	A third year
19 or more	7	. . . .	. . . .
18	7	1	. . . .
17	7	2	. . . .
16	7	3	. . . .
15	7	4	. . . .
14	7	5	. . . .
13	7	6	. . . .
7 to 12	7	7	. . . .
6	7	7	1
5	7	7	2
4	7	7	3
3	7	7	4

It should be noted that the table excludes from the yearly residence requirements the five months' absence permitted each year under Section 231.

The maximum credit which may be obtained is two years. This means that if the maximum credit is earned, only seven months of residence and one season of cultivation need be carried out by the qualifying veteran. In the absence of a service-related injury, the resident's credit is earned on a day-by-day basis. For example, 91 days' military service will earn the veteran 91 days of residence credit. Therefore, if 91 days of credit is earned, the veteran would be required to reside on the land for a full seven months during the first two years but only seven months less 91 days during the third entry year. 164/

The statutory provisions also provide that cultivation need not be conducted during the period of time earned as a military credit. This is subject to the last sentence of

164/ For a detailed explanation of the computation procedures see United States v. Cooke, 59 I.D. 489, 492 (1947).

section 279 which requires that at least one-eighth of the area entered must be cultivated for a period of one year.

The veteran's rights granted by section 279 can be applied to any of the years in which residence and cultivation is required. Therefore, if an entryman who had cultivated the land during the second year but not the third filed proof after the third year, the military credit could be applied to the third year thereby resulting in compliance with the homestead laws. 165/

Even though the entryman may be entitled to two years' residence credit, he must still establish residence within six months after the entry has been allowed as required of all entrymen by section 169. 166/

The statute and regulations require that the veteran have served at least ninety days, been discharged on account of wounds or disability incurred in the line of duty, or after discharge have been furnished hospitalization or awarded compensation for service-connected wounds or disability. 167/ In the case of McClymonds v. Cooper, 168/ the applicant was erroneously allowed to make entry under one of the numerous veterans' preference provisions which were in force at that time. He had served in the army for one month and nine days and was discharged because of a disability. The Secretary found, however, that the disability existed prior to his induction and, therefore, did not qualify him for the veteran's benefit.

b. The Soldier's and Sailor's Relief Act of 1940

The Soldier's and Sailor's Civil Relief Act of 1940 was enacted to protect men and women serving in the armed forces from forfeiting any rights which may be jeopardized by their absence from civilian life.

50 U.S.C. App. Section 561 (1964) states that:

- (1) No right to any lands owned or con-

165/ Walter H. Bullwinkle, Joseph E. Vogler, 63 I.D. 172 (1956); William F. Musgrove, A-30115 (Interior Dec., November 23, 1964).

166/ Clifton V. Dayley, A-29942 (Interior Dec., September 9, 1964).

167/ 43 U.S.C. sec. 279 (1964); 43 C.F.R. sec. 2033.1-1(a) (1968).

168/ 60 I.D. 358 (1949).

controlled by the United States initiated or acquired under any laws of the United States, including the mining and mineral leasing laws, by any person prior to entering military service shall during the period of such service be forfeited or prejudiced by reason of his absence from the land or his failure to perform any work or make any improvements thereon or his failure to do any other act required by or under such laws.

This enactment prevents a forfeiture of a homestead entryman's right to a patent because of his failure to reside upon or cultivate the land while in the armed forces. It is quite clear that this provision only protects the entryman from forfeiture of his entry for failure to carry out the necessary requirements while he is in the military service. If the failure to comply occurred prior to the entry into the service, section 561 (1) affords the entryman no relief. 169/ However, if an allegation of failure to comply with the homestead requirements prior to entry into the military service is alleged, proceedings on the alleged failure to comply will be suspended for the period of military service. 170/

As noted under the discussion of the 1944 Act, the provisions of the 1944 Act apply only to entries made by veterans after discharge from the military service. The provisions of the 1940 Act apply to military personnel who made entries prior to induction into the military service. 50 U.S.C. App. Section 562 (1964) states that:

If any person whose application for a homestead entry has been allowed or who has made application for homestead entry which may thereafter be allowed, after such entry or application enters military service, . . . the Department of the Interior shall construe his military service to be equivalent to residence and cultivation upon the tract entered or settled upon for the period of such service. . . . If such person is discharged on account of wounds received or disability incurred in the line of duty, the term of his enlistment and any period of hospitalization due to such wounds or disability shall be deducted from the required length of residence, without reference to the time of actual service. No patent shall issue to any person who has not resided upon, improved, and cultivated his homestead for a period of at least one year.

169/ David H. Evans, A-27353 (Supp.) (Oct. 18, 1961).

170/ 43 C.F.R. sec. 2033.2-5(e)(2) (1968).

The provisions of this act can benefit the entryman in two different ways. First, if the entryman enters the service immediately after approval of his entry application, and remains in the service for a period of two years, he will have only one year's residence and cultivation to be completed in order to qualify for a patent. The year of required residence and cultivation would be the third entry year, and as such, the entryman would be required to cultivate one-eighth of the entry. If, however, the entryman was induced into the military service after having spent one year on the land, and remained in the service for a period of two years, he could immediately file final proof without further residence on the homestead entry. In this case, since the one year of residence required by section 562 occurred during the first entry year no cultivation would be required. 171/

The Soldier's and Sailor's Civil Relief Act of 1940 also provides that if the entryman dies in service or as a result of his service, his widow, if unmarried, or his minor children may make final proof and the entryman's death shall be construed as equivalent to performing all the requirements as to residence and cultivation. 172/ This differs from the provisions of the 1944 Act previously discussed which require survivors to cultivate at least one-eighth of the entry for one year. The 1940 Act also provides that an honorably discharged veteran who is unable to return to the land because of service acquired physical disabilities may make final proof without any further residence, improvement or cultivation. 173/

F. The Rights of Survivors to Make Final Proof and Obtain a Patent

Section 164, the provision dealing with final proof, also governs the rights of the entryman's widow or heirs in case of his death before the submission of final proof.

171/ Although the last sentence of section 562 seems to require that the land must be resided upon, improved, and cultivated for a period of one year before a patent will issue, the language of this section is identical to that found in 43 U.S.C. sec. 240 and 43 U.S.C. sec. 272, two provisions dealing with the rights of veterans of early wars. These two provisions have been interpreted to permit the issuance of a patent in the absence of cultivation if final proof is filed before the inception of the second entry year. See 43 C.F.R. sec. 2033.1-4(b)(2) (1968).

172/ 50 U.S.C. App. sec. 563 (1964).

173/ Id.

These rights are in addition to those just discussed concerning a veteran's widow and children. Section 164 states that if the entryman is dead final proof may be made by his widow, or if she is also dead, by his heirs or devisee. The section also provides that those succeeding the deceased entryman must show:

(T)hat the entryman had complied with the law in all respects to the date of his death, and that they have since complied with the law in all respects, as would have been required of the entryman had he lived, excepting that they are relieved from any requirement of residence upon the land 174/

The provisions of section 164 are modified somewhat by section 171 which states that in case of the death of both a father and mother, leaving a minor child or children, the right of the entryman inures to the benefit of such children, and the executor, administrator, or guardian may, within two years after the death of the surviving parent, sell the land for the benefit of such children. The purchaser of the land acquires absolute title by his purchase, and is entitled to a patent on the payment of the office fees and the purchase price.

(a) If a homestead entryman dies without having submitted final proof, his rights under the entry pass to his widow, or, if there be none, and the children if any are not all minors, then to his heirs or devisees. However, if all the heirs be minor children of the entryman or entrywoman, and their other parent be dead, the entry is not subject to devise. In such a case the right to a patent vests in the children at once upon proof only of the death of both parents and that they are the only children of the homesteader, provided, as to male homesteader, that there be no widow. The law provides, in the alternative, that the executor, administrator, or guardian may, within two years after the death of the surviving parent, sell the land for the benefit of the children, in accordance with the law of the State where they are domiciled. In such cases it is required that there be furnished record evidence of an order for the sale made by a court of competent jurisdiction. In any event,

174/ 43 U.S.C. sec. 164 (1964).

publication and posting of notice of intention to submit proof or ask issuance of patent to the purchaser is required.

(b) Persons succeeding as widow, heirs, or devisees (sic) to the rights of a homestead entryman are not required to reside upon the land covered by the entry, but they must cultivate it as required by law for such period as will, added to the entryman's period of compliance with the law, aggregate the required term of 3 years. They are allowed a reasonable time after the entryman's death within which to begin cultivation, proper regard being had to the season of the year at which said death occurred. . . . They must in all cases show that they are citizens of the United States regardless of the question whether the entryman was himself a citizen. Moreover, the entry may not be completed by the widow, heirs, or devisee of a homestead entryman unless he himself had complied with the law in all respects to the date of his death, and they must also show, at the time of final proof, that there is a habitable house on the land. 175/

1. The Land Does Not Pass to the Survivors by Probate

Although the above quoted regulations are fairly self-explanatory, certain areas should be stressed and expanded upon. Under section 164, if an entryman dies before completing final proof, his widow or heirs do not take the property by descent. As stated in the case of Demars v. Hickey: 176/

Under Section 2291, (43 U.S.C. sec. 164 (1964)), the heirs do not take the property by descent; they are entitled in their own right They become the donees or grantees of the government. The entryman has no interest capable of disposal by will or that descends like other property to his heirs. Hence the land embraced in the entry does not become in any sense the property of the estate, and does not come within the jurisdiction of the probate

175/ 43 C.F.R. sec. 2211.3-2 (1968).

176/ 13 Wyo. 371, 80 P. 521 (1905).

court for administration or sale. 177/

The widow, of course, has the first right to complete the requirements for issuance of a patent. The statute and the regulations are silent with regard to the rights of heirs if the entryman's widow is alive but renounces the homestead entry. In this situation, the cases hold that the heirs may enter the land, complete the requirements and submit final proof. In Phillippina Adam, 178/ the Secretary of the Interior said:

No valid reason can be urged why renunciation by the widow of her statutory right, or disqualification that would prevent her from completing the entry, would not be as effective to pass the right to the heirs and leave them free to perfect the claim, as if she were dead. 179/

If the widow enters the land and attempts to complete performance of the conditions necessary to the acquisition of title, but dies prior to the time that she is entitled to a patent, the cases have held that it is the original entryman's heirs, and not the widow's, who are entitled to perform the conditions, make final proof and receive the patent. 180/ Once again, it should be noted that upon the death of the widow of the entryman, the right to make satisfactory final proof does not descend by inheritance, but rather by virtue of Federal law. As stated in the case of Mary M. Boes; Sarah A. MacQueen: 181/

The inchoate right or privilege granted to the statutory successors by section 2291, Revised Statutes, is one which may be availed of by making satisfactory final proof as basis for patent, or it may be relinquished or abandoned. It is not, however, subject to transfer and does not descend by inheritance. 182/

177/ Id. at 379, 80 P. at 522. See also Martie v. Martie, 271 P. 2d 385 (Okla. 1954); and Daniels v. Isham, 40 Idaho 614, 235 P. 902, 905 (1925), where the following language is found: "The homestead entry or the land covered by it never became a part of the estate of the deceased entryman nor did the entryman have a devisable interest in the ordinary sense, but the Federal statute provides, there being no widow, proof may be made by the heirs of devisee and the devisee is merely the party nominated in the will as the party who may avail himself of the privilege granted by Congress to complete the proof and secure for himself the property."

178/ 40 L.D. 625 (1912).

179/ Id. at 627.

180/ Robinson v. Phillips, 66 Okla. 285, 168 P. 1005 (1917).

181/ 55 L.D. 572 (1936).

182/ Id. at 575.

The pertinent provision of section 164 states that final proof may be made by the heirs or devisee. Under this provision, if there is a will, the devisee succeeds to the homestead entryman's right and may, by compliance with the homestead law, obtain patent from the United States to the exclusion of the heirs of the deceased. However, it should be reemphasized that a devisee does take the entry by descent but is only the person nominated by the will as the party who may avail himself of the privilege granted by Congress to complete homestead proof. 183/

2. The Determination of Heirs and Their Rights and Duties

The statute only talks about the widow of an entryman and does not make reference to the widower of an entrywoman. The widower of an entrywoman is considered an heir, and therefore, takes as an heir under section 164. 184/

State law determines the definition of an heir. 185/ The case of Harris v. Lyon 186/ involved an entrywoman who died intestate leaving a minor heir and husband. The husband was an heir under Arizona law to the extent of receiving a one-third life estate in his wife's property. The court held that the husband was an heir under the homestead law and that he would receive a life estate of one-third of the land, remainder to the child or children, upon issuance of the patent. This case seems to establish the proposition that section 164 determines only who shall have the right to prove up the homestead entry. It implies that state law will not only determine who is an heir, but also what share of the patent each heir will receive.

Although state law determines who is an heir under section 164, aliens may not receive a patent, even if, under state law, they are heirs and may succeed to a descendent's estate. 187/

Generally, in the absence of a special situation such as is described above involving a surviving husband and a minor heir, the heirs obtain title to the entry as tenants in common. 188/ Even if one of the heirs spends substantially all of his time and money perfecting the entry, and the other heirs do nothing, these facts cannot alter the established rule that the final certificate, when issued, must be to the

183/ Daniels v. Isham, 40 Idaho 614, 235 P. 902 (1925);
Trueman v. Bradshaw, 43 L.D. 242 (1914).

184/ Harris v. Lyon, 16 Ariz. 35, 140 P. 985 (1914).

185/ Heirs of May Lyon, 40 L.D. 489 (1912).

186/ 16 Ariz. 35, 140 P. 985 (1914).

187/ Mork v. Mellett, 62 Mont. 477, 205 P. 664 (1922).

188/ Maude E. Huffman Pullen, 51 L.D. 418 (1926).

heirs generally, and not to the heir perfecting the entry alone. 189/

As noted in the quoted provision of the regulations, widows and heirs must show that there is a habitable house upon the land at final proof. This anomalous requirement exists in spite of the fact that they are not required to reside upon the land. 190/

3. The Rights of Minor Children

Section 171 provides for the issuance of certificates and patents of homestead lands to the minor children in case of the death of both parents. The cases have interpreted this provision to require that all of the children of the entryman be minors. If there are any adult children, then the provisions of section 171 do not apply, but instead, the provisions of 164 apply. 191/ This immediate vesting of title in the minor child or children is demonstrated in Raistakka v. Fagerstrom. 192/ In this case, the entryman died leaving a two year old daughter. She later died before the patent was issued. The court, citing the United States Supreme Court decision in Bernier v. Bernier, 193/ stated:

(S)ection 2291 (43 U.S.C. sec. 164 (1964)) applies only in the event the surviving heirs are adults, or adults and minors, and . . . section 2292 (43 U.S.C. sec. 171 (1964)) applies exclusively in every case where the surviving heirs are under twenty-one years of age and there are no adult heirs . . . (in this case R.S. 2292 applies.)

Upon the death of (the entryman) the land did not become a part of his estate. . . But since (his daughter) was his only child, was under the age of twenty-one years, and survived him, the "right and fee" inured to her benefit, not by right of inheritance, but in virtue of the law itself. 194/

189/ Id.

190/ Heirs of Daniel Mahoney, 47 L.D. 44 (1919).

191/ Bernier v. Bernier, 147 U.S. 242 (1893).

192/ 64 Mont. 173, 208 P. 949 (1922).

193/ 147 U.S. 242 (1893).

194/ 64 Mont. at 177-78, 208 P. at 951. The court held that the title to the property inured to the child's benefit immediately upon the entryman's death. Upon her death, therefore,

note continued

4. Survivors Rights if Entryman Dies After Fulfilling all Requirements for Patent

The provisions of section 164 concerning the death of the entryman only apply if the entryman dies before he fulfills all the requirements for the issuance of a patent. If all the prerequisites have been completed before his death, section 1152 applies. It provides:

Where patents for public lands have been or may be issued, in pursuance of any law of the United States, to a person who has died before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assignees of such deceased patentee as if the patent had issued to the deceased person during life. 195/

This section has been interpreted not only to apply to an entryman who dies between the presentation of acceptable final proof and the issuance of the patent, but also to an entryman who has fulfilled the requirements to perfect an entry but who has not yet noticed his intention to file final proof. 196/

Since the provisions of section 1152 hold that the land passes to the heirs as if the patent had issued during the deceased person's life, the entry passes through his will and is subject to the jurisdiction of the probate courts. 197/

note 194 continued:

the land became a part of her estate subject to the laws of that state which controlled the descent and distribution of property belonging to one who dies intestate. The case of *Snow v. Heirs of Stotts*, 40 L.D. 638 (1912), raised an interesting fact situation. The deceased entryman was divorced before entry. Custody of his child was given to his former wife. When the entryman died prior to final proof, leaving his minor child still in the custody of his former wife, the child was his only living heir. No cultivation of the property was carried out and the child contended that it was entitled to a patent without cultivation due to the provisions of Section 171. The Secretary of the Interior disagreed stating that Section 171 had no application as the mother of the minor child was still living. This resulted in a situation where the only heir was a minor child yet the child was required by the provisions of 164 to cultivate and improve the land.

195/ 43 U.S.C. sec. 1152 (1964).

196/ *Mortgage & Debenture Co. v. Rhodes*, 75 Okl. 298, 183 F. 481 (1919).

197/ *Doran v. Kennedy*, 237 U.S. 362 (1915); *Parmeter v. Butler*, 228 F. 668 (8th Cir., 1915).

G. Final Proof - Procedure

1. General

Section 164 states that the entryman must file final proof not less than three nor more than five years after entry. The purpose of this proof is to demonstrate that the entryman has complied with the substantive requirements of residence and cultivation.

The applicable provision of section 164 requires that the entryman prove "by himself and by two credible witnesses" that he has met the requirements of the law. This provision has been expanded upon by the passage of additional legislation and the promulgation of extensive regulations. Section 251 requires that before final proof is submitted the entryman must file with the proper land office a notice of his intention to make such proof. The notice must contain a description of lands entered, and state the names of the witnesses who will testify on behalf of the entryman. After publication of a 30-day notice that the entryman has filed his notice of intention, the entryman is entitled to make final proof. Section 251 also permits the Secretary of the Interior to make rules governing the procedure for making final proof.

The regulations promulgated by the Secretary pursuant to section 251 require the entryman to file his notice with the manager of the local land office. The notice shall include, among other things:

(T)he name and post-office addresses of at least four of his neighbors who can testify from their own knowledge as to facts which will show that he has in good faith complied with all the requirements of the law. 198/

On the day final proof is taken, the entryman and at least two of the witnesses named in the notice must appear before the officer designated to take proof. 199/ The testimony of the claimant and his witnesses is recorded on prescribed forms. 200/ As stated on the forms and in actual practice, neither of the witnesses may be present while the testimony of the claimant is being given and neither the claimant nor the other witnesses may be present when the testimony of a witness is being taken. As the purpose of the final proof hearing is to discover if residence, cultivation and other requirements for successful homestead entry have been carried out, the Bureau of Land Management has established a list of questions which should be answered in order to determine if

198/ 43 C.F.R. sec. 2211.1-4(c)(1) (1968).

199/ 43 C.F.R. sec. 2211.1-4(c)(4) (1968).

200/ Form 2211-2 and Form 2211-3. Copies of these forms may be found in Appendix B, p. B-5 et seq.

These requirements have been fulfilled. A copy of this list which is Chapter 2.2 of Part 2 of Volume 5 of the Bureau of Land Management Manual (March 31, 1955), is included in Appendix D of this report at Page D-12. The Bureau does not rely entirely on the testimony presented. Field examinations are routinely made to verify the statements made.

2. Equitable Adjudication

As previously stated, section 164 gives the entryman five years from the date of entry in which to file final proof. Section 2211.1-4 (a) of the regulations expands on this as follows:

(1) Either final or commutation proof may be made at any time when it can be shown that there is a habitable house upon the land and that the required residence and cultivation have been had. Proof must be submitted within 5 years. Failure to submit proof within the proper period is ground for cancellation of the entry unless good reason for the delay appears; satisfactory reasons being shown, final certification may be issued. 201/

The Department of the Interior has been very lenient, and has not applied the five year rule rigidly. If there are mitigating circumstances for not filing final proof, the Department will allow filing to be made under the equitable adjudication procedure. 202/

Equitable adjudication is also permitted in a wide variety of situations by section 2011.1-1 of the regulations. 203/

201/ 43 C.F.R. sec. 2211.1-4(a) (1968).

202/ For example, see the case of Ruth Gary, A-30329 (Interior Dec., August 6, 1965) in which case the mitigating circumstances were that the entrywoman had been unable to find the land office. During the period between her entry and final proof the office had moved from Los Angeles to Riverside.

203/ 43 C.F.R. sec. 2011.1 (1968). "The cases subject to equitable adjudication by the Director, Bureau of Land Management, cover the following: (a) All classes of entries in connection with which the law had been substantially complied with and legal notice given, but the necessary citizenship status not acquired, sufficient proof not submitted, or full compliance with law not effected within the period authorized by law, or where the final proof testimony, or affidavits of the entryman or claimant were executed before an officer duly authorized to administer oaths but outside the county or land district, in which the land is situated,

Note continued

Generally these are situations in which substantial, but not complete, compliance with the laws and regulations has occurred. In such cases the Director of the Bureau of Land Management may grant relief on the basis of equity. 204/

3. Who May Make Final Proof

Section 164 and the regulations 205/ designate who may submit final proof. First, final proof must be made by the entryman personally and cannot be made by agents, attorneys in fact, administrators, or executors. Further, final proof can be made only by citizens of the United States. 206/

As discussed earlier in this chapter 207/ widows and heirs can file final proof under certain circumstances. The law also provides that a deserted wife may submit final proof if she has been abandoned or deserted by her husband for more than one year. 208/ In such a case she would be allowed credit for all residence, cultivation, and improvements made by herself or her husband. When the deserted wife files notice of intention to submit proof, she must also supply any information in her possession as to her husband's whereabouts. 209/ The

note 203, continued:

and special cases deemed proper by the Director, Bureau of Land Management, where the error or informality is satisfactorily explained as being the results of ignorance, mistake, or some obstacle over which the party had no control, or any other sufficient reason not indicating bad faith, there being no lawful adverse claim."

204/ The case of William Dittman, A-30240 (Interior Dec., January 26, 1965), presents a good example of the extreme length to which the Bureau of Land Management will go to allow a final proof after the expiration of the five-year life of the entry. In this case the entryman, Dittman, continually refused to file final proof, apparently feeling that he was being harassed by government officials who were trying to drive him off his land. On appeal from a second cancellation order the Secretary of the Interior gave the entryman a third chance to file late proof and to explain why his proof was not timely filed.

205/ 43 C.F.R. sec. 2211.1-4(d) (1968).

206/ Id.

207/ See supra., pp. 74-82.

208/ 43 U.S.C. sec. 170 (1964).

209/ 43 C.F.R. sec. 2211.1-4(d)(4)(11) (1968).

SPECIAL HOMESTEAD LAWS

Land manager will then prepare and issue a summons for attempted service on the husband stating that the wife has claimed the homestead as a deserted wife. 210/ Personal service of the summons must be made if possible. However, if personal service cannot be made, service by registered mail to the husband's last known address is acceptable. 211/ Within thirty days after service, the husband may file a denial of the abandonment charge. If the summons is served by mail, the husband has forty days in which to make such answer. If the answer is not made, the land manager will then issue the notice of intention to submit proof. The proof will announce the fact that it is being made by a deserted wife. 212/ If the husband files an answer denying the desertion, a hearing will be held at which testimony may be submitted to determine the facts relative to the alleged desertion. 213/

H. Conclusion

After completion of all the final proof requirements the entryman is entitled to receive a patent to his land, subject to the Government's right to initiate a contest for any cause effecting the legality or validity of his entry or settlement. 214/ Upon issuance of the patent the entryman obtains fee title to the land and is free to deal with it the same as any other land owner. He can sell it to whom-ever he desires or put it to any use he wishes. He no longer has to reside upon or cultivate it. In other words he is no longer subject to the provisions of the homestead laws.

This chapter has discussed the general homestead laws. These are the laws under which most of the homestead entries have been made in the past. In addition to these general laws Congress has adopted a number of other statutes which may be termed special homestead laws. They are, in effect, variations of the general homestead laws and are the subject of the next chapter.

210/ Id.

211/ 43 C.F.R. sec. 2211.1-4(d)(4)(iii) (1968).

212/ 43 C.F.R. sec. 2211.1-4(d)(4)(v) (1968).

213/ 43 C.F.R. sec. 2211.1-4(d)(4)(vi) (1968).

214/ Such Government contests are specifically provided for in 43 C.F.R. sec.1852.2 (1968).

As the years passed and the American frontier continued to move westward and eventually disappear, pressures grew to amend or supplement the homestead laws to correct what were felt to be deficiencies or inequities. Amendments, such as those mentioned at the beginning of Chapter 1, which reduced the time required to perfect a homestead were passed. Congress also enacted several supplemental laws creating special types of homesteads. These variations from the general homestead laws, which are the subject of this chapter, have been grouped into four categories: commutation of homesteads, additional homesteads, enlarged homesteads and reclamation homesteads. Only the ways in which the requirements of these special kinds of homesteads differ from those for general homesteads are discussed. Except for these differences, the substantive and procedural requirements of the general laws apply to entries under these special statutes.

A. Commutation of Homestead Entries

There are special homestead laws which permit an entryman to obtain a reduction in the residence and other homestead requirements by paying the statutory minimum price for the land he has entered. This procedure known as "commutation" is described in section 173 which provides that commutations of homestead entries shall be allowed fourteen months after date of settlement. A person submitting commutation proof must, according to section 173, pay the minimum price for the quantity of land entered. This is \$1.25 per acre, except it is \$2.50 per acre for lands within the limits of certain railroad grants. 1/ In a decision rendered many years ago the Department of the Interior described the purpose of the commutation statute as follows:

The intent of the commutation provision is indubitably derivable from the act itself. An onerous task was imposed of five years' residence and cultivation as a condition to the granting of title. In the mutability of human affairs it was evident that some who accepted the proposal in utmost good faith, with intent to comply strictly, would be unable to do so, and others could not without unreasonable inconvenience and loss. Without some such provision, they would be compelled to lose all expenditure for improvement and all time served on the entry period as well

1/ 43 U.S.C. sec. 678 (1964); 43 C.F.R. sec. 2202.1 (1968); 43 C.F.R. sec. 2211.2-2(b)(4) (1968).

as the loss of the homestead right.

The commutation provision was the relief offered against such unforeseen casualties and accidents. There might be an infinite variety of them, failing health, disabling injuries, offers of better employment, and the infinite variety of things that within five years change the desires and aims of many lives.

It was to meet this accident of life that the commutation provision was framed to relieve (sic). 2/

In his History of Public Land Law Development, Professor Gates indicates that regardless of the intent of the commutation law, it was probably most often used not as relief against unforeseen casualties and accidents, but as a device for speculation. Speculators would make an entry, commute it by paying the required price, receive a patent and sell the land at a profit. 3/

As a general rule, all original, second, additional, and adjoining homestead entries may be commuted. The one major exception to this rule is that an additional contiguous entry under the provisions of section 213 may not be commuted since only one year of cultivation and no residence is required to perfect such an entry. 4/ Also, as pointed out later, enlarged homesteads cannot be commuted.

In order to successfully commute a homestead entry, the regulations require the following:

(2) The entryman, or his statutory successor, must show that substantially continuous residence upon the land was maintained until the submission of the proof or filing of notice of intention to submit same, the existence of a habitable house on the claim and cultivation of the area commuted to the extent required under the ordinary homestead laws, that is, cultivation of one-sixteenth of the area during the second year of the entry, and one-eighth during the third entry year and until final commutation proof. However, the proof may be accepted where actual residence on the land for the required period of 14 months is shown, even though slightly broken, provided it be in reasonably compact periods; and the failure to continue the residence until filing of notice

to submit proof will not prevent its acceptance if the Bureau of Land Management be full satisfied of the entryman's good faith, and provided no contest or adverse proceedings shall have been initiated for default in residence, or other good cause, prior to filing of such notice. . . .

(3) An entryman submitting commutation proof may add together, to make up the 14 months, periods of residence before and after an absence under a leave of absence regularly granted, or an absence of not exceeding 5 months of which he had given notices as provided by the act of June 6, 1912 (37 Stat. 123; 43 U.S.C. 164).

. . . .

(5) The claimant must show full citizenship, as in the case of a 3-year proof. 5/

The filing of commutation proof does not eliminate the requirement that the entryman's residence must have been in good faith with an intention to establish a home for his family. Bearing in mind the quotation regarding the purpose of the commutation provisions, the cases have held that there must have been an original bona fide intent to make the land a home. 6/ Some cases have held that the filing of a commutation proof will invite a careful examination of the entryman's bona fides. In the case of Patton v. Quackenbush 7/ the Secretary stated:

(W)here the development of a tract of land as a permanent abode is claimed to be the chief aim and consideration, the entryman, by submitting commutation proof and paying a price to cut short the period of residence required by the homestead laws, invites scrutiny and challenges judgment as to the good faith of his entry. 8/

5/ 43 C.F.R. sec. 2211.2-2(b) (1968).

6/ Gilbert Satrang, 37 L.D. 683 (1909).

7/ 35 L.D. 561 (1907).

8/ Id. at 562.

2/ Gilbert Satrang, 37 L.D. 683, 686 (1909).

3/ P. Gates & R. Swenson, History of Public Land Law Development 490 (1968).

4/ 43 U.S.C. sec. 213 (1964).

As noted above, the regulations require cultivation of the area commuted to the extent required under ordinary homestead laws, that is, cultivation of one-sixteenth of the area during the second year of the entry and one-eighth during the third entry year and until final commutation proof. As stated in the case of John Robert Claus; Richard H. Yoder: 9/

(W)here the commutation proof is not submitted until after a substantial portion of the third entry year has elapsed, it seems clear that the statutory requirement of cultivation of one-eighth of the entry in the third year, which is applicable to regular entries ... would also apply to a commuted entry. There is nothing in the statutory provisions on the commutation of entries with respect to the extent of the cultivation required... so it seems clear that the general cultivation requirements of the statute are applicable. 10/

B. Additional Entries

The term "additional entry" refers to the situation where an entryman has made an initial entry of less than 160 acres and wishes to enter an additional amount of land in order to bring the total homestead up to 160 acres. The statutes designate two major types of additional entries, an additional entry on land contiguous to the original entry 11/ and an additional entry on noncontiguous land after the submission of final proof. 12/ A third type of additional, the soldier's additional, 13/ also exists. This soldier's right, however, is of rapidly diminishing importance and will be discussed only briefly.

1. Additional Entries on Contiguous Parcels

Section 213 states:

Any homestead settler who has heretofore entered, or may hereafter enter, less than one-quarter section of land, may enter other and additional land lying contiguous to the

9/ 60 I.D. 457 (1951).

10/ Id. at 460.

11/ 43 U.S.C. sec. 213 (1964).

12/ 43 U.S.C. sec. 214 (1964).

13/ 43 U.S.C. sec. 274 (1964).

original entry which shall not, with the land first entered and occupied, exceed in the aggregate one hundred and sixty acres.

Before a patent may issue on the additional entry, the entryman must show that he has cultivated an amount equal to one-eighth of the area after the additional entry and until the submission of final proof thereon. The cultivation required with respect to the additional entry may be performed on the original entry, the additional entry or on both, but where it is performed on the original entry, it must be in addition to that required and relied upon in making final proof on the original entry. No proof of residence shall be required with respect to the additional entry.

The additional entry may be made before or after final proof has been made on the original entry. Final proof for the additional entry may be submitted only at the time of final proof for the original entry, or subsequent thereto, but must be submitted within five years after the additional entry is made.

This section shall not apply to or for the benefit of any person who does not own and occupy the lands covered by the original entry. If the original entry should appear to be illegal or fraudulent, the additional entry shall not be permitted or, if having been initiated, shall be cancelled. 14/

It is quite clear, and the regulations so state, 15/ that the additional contiguous entry may be made by either an entryman who has not perfected his entry or by one who has perfected his entry if he still owns and occupies the land. The statutory provision would not apply to successors in interest of the original entryman since as long as they did not own more than 160 acres of other land, they could enter land in their own right under the original homestead entry rules. 16/

14/ 43 U.S.C. sec. 213 (1964).

15/ 43 C.F.R. sec. 2211.4-2(a) (1968).

16. 43 U.S.C. sec. 161 (1964).

The statute requires that the applicant for an additional entry, own and occupy the lands covered by the original entry. The Department has defined the expression "own and occupy" to mean residence upon the original entry if the entry is unperfected. However, if the entryman has obtained a patent for the original entry, residence thereon is no longer required to support a finding of occupation. In the latter instance, the term occupy is given its ordinary and usual meaning with reference to land in private ownership. In this sense of the term, it does not require actual residence, but only such occupying as shows an actual and exclusive possession and proprietorship of the premises. 17/

The requirement of ownership of the original entry is satisfied if the entryman holds title at the time the additional entry is made. There is nothing in the statute which requires him to continue to own and occupy the original entry up to the time he makes final proof on the additional entry. 18/

On the other hand, the case of George L. Hollis 19/ indicates that an undivided joint interest in land will not entitle the holder of such joint interest to make an additional entry until he can show that the half interest which belongs to him is contiguous to the tract of land which he now wishes to enter. Although the Hollis case involved an adjoining original entry and not an additional contiguous entry, 20/ the reasoning can by analogy be adopted in the additional contiguous entry situation since section 161 governing adjoining entries requires that the land to be entered be contiguous to the farm owned by the prospective entryman. In this case, the Secretary reasoned that the entryman could not make an adjoining entry because he could not show that his undivided one-half interest was contiguous. Such a situation can be avoided by a conveyance from the co-tenant or co-tenants to the entryman of the title to the lands contiguous to the land applied for as an additional entry. The deeds would have to be recorded showing a bona fide present and unconditional transaction. 21/

The cases hold that only one additional entry may be made by an entryman even if that additional entry does not bring the total land holdings up to 160 acres. 22/ However, the cases

17/ Oinanen v. Ulvi, 42 L.D. 56 (1913).

18/ Roby v. Krokstrom, 48 L.D. 564 (1921).

19/ 56 I.D. 340 (1938).

20/ For discussion of adjoining entries see p.26.

21/ George L. Hollis, 56 I.D. 340, 342-43 (1938).

22/ William B. Ketchum, 48 L.D. 144 (1921).

have held that where an additional homestead entry fails of consummation for good and sufficient reasons, not the fault of the entryman, such futile attempt to obtain an additional entry will not exhaust the entryman's right of additional entry. 23/

2. Additional Entries on Noncontiguous Land After Final Proof

Section 214 provides for additional entries on non-contiguous land after the entryman has made final proof on his original entry. The original entry must have been for less than 160 acres. The entryman can enter by legal subdivisions additional land so long as the total of his original and additional entries does not exceed 160 acres. This amendment to the general homestead laws was necessitated by the fact that the original homestead law had been interpreted to allow only one original entry even if the original entry was for less than 160 acres. 24/ Under section 214, the applicant for the additional entry is not required to show that he is still the owner or occupant of the land originally entered. 25/ In the case of the noncontiguous additional entry residence on and cultivation of the additional entry is required, whereas if the additional entry is contiguous, continued residence on the original entry and cultivation of either the original or additional entry is all that is required.

3. Soldiers' Additional Homesteads

In 1872, Congress passed a statute designed to permit additional entries by veterans of the Civil War. 26/ This provision which is now codified as section 274 states:

Every person entitled, under the provisions of section 271 of this title to enter a homestead who may have, prior to June 22, 1874, entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres. 27/

23/ Charles H. Lucas, 43 L.D. 367 (1914).

24/ William B. Ketchum, 48 L.D. 144 (1921).

25/ 43 C.F.R. sec. 2211.4-1(c) (1968).

26/ Act of June 8, 1872, ch. 338, sec. 2, 17 Stat. 333.

27/ 43 U.S.C. sec. 274 (1964).

On the surface, it seems that this provision would be inoperative today since there are no living Civil War veterans. However, in the case of Anderson v. Clune ^{28/} the United States Supreme Court held that the veteran's rights to enter additional land was a property right. It could be conveyed and vested in a purchaser, and it would pass to the veteran's estate upon his death if not transferred beforehand. This decision resulted in a situation whereby assignees and heirs of Civil War veterans who made homestead entries prior to June 22, 1874, were the possessors of a right to enter and homestead additional land, which right would never expire.

Since in theory this right would continue for an infinite length of time, Congress acted in 1955 to identify the rights outstanding and to cancel those that were not identified within a certain length of time. The Act of August 5, 1955 ^{29/} provided that any owner or any person claiming a right to a soldier's additional homestead must record it with the Department of the Interior within two years from the effective date of the Act. ^{30/} Rights which were not recorded, would not thereafter be accepted by the Secretary of the Interior as a basis for the acquisition of lands.

In 1964, the Congress went further and stated that any recorded rights not satisfied by January 1, 1975, would be void. ^{31/} This latter statute also permits the holder of a soldier's additional right to have his claim satisfied in cash.

As a result of the 1955 and 1964 Congressional enactments, the soldier's additional right is of rapidly diminishing importance and will be of only historical interest after 1974. However, one interesting point should be raised.

The Act of August 31, 1964, requires the Secretary to:

(C)lassify, for conveyance and exchange for each type of claim recorded under the Act of August 5, 1955, public lands in sufficient quantity so as to provide each holder of such a claim with a reasonable choice of public lands against which

^{28/} 269 U.S. 140 (1925).

^{29/} Ch. 573, 69 Stat. 534.

^{30/} This act also applied to various scrip rights and lieu selection rights.

^{31/} Act of August 31, 1964, Pub. L. No. 85-545, secs. 1-6, 78 Stat. 751.

to satisfy his claim. The public lands so classified shall be of value of not less than the average fair market value, determined by the Secretary as of the date patent issued, of those public lands actually conveyed in exchange for each type of claim since August 5, 1955. ^{32/}

Pursuant to this provision the Secretary has ordered that, in satisfaction of soldier's additional homesteads, the claimant is entitled to receive tracts of land having a value per acre no less than \$250 nor more than \$275. ^{33/} There is no specific statutory provision which grants the Secretary the power to set such a maximum value. However, in the case of Zella Hamlin ^{34/} the Secretary after carefully examining the legislative history of the 1964 Act, determined that the Department of the Interior had the administrative power to set a maximum and prohibit soldiers' additional homestead entries on lands worth more than the maximum. ^{35/}

C. Enlarged Homesteads

By the end of the nineteenth century most of the government's choice arable land had passed into private hands. The remaining public land was located in the western portion of the nation and consisted of large tracts of arid and semi-arid land. As settlers immigrated into the western states the 160-acre limitation found in the homestead laws proved insufficient for profitable farm operation.

Revisions were proposed in Congress to make the homestead laws conform to the needs of the time and the land offered. The first congressional action was the enactment of the so-called Kinkaid Act ^{36/} passed specifically for Western Nebraska, which allowed entry of 640 acres in that semiarid region.

^{32/} Id. at sec. 3

^{33/} 43 C.F.R. sec. 2221.07(e)(1) (1968); 43 C.F.R. sec. 2221.07(f)(1) (1968).

^{34/} 74 I.D. 400 (1967).

^{35/} Id. The case presents an interesting example of the procedure followed by the Department of the Interior to determine the scope of administrative discretion.

^{36/} Act of April 28, 1904, ch. 1801, secs. 1-3, 33 Stat. 547-48 (codified as amended at 43 U.S.C. sec. 224 (1964)).

In 1909 Congress enacted the Enlarged Homestead Act ^{37/} to apply to the states of Montana, Wyoming, Colorado, New Mexico, Arizona, Utah, and Nevada. This act, which, as amended is now codified in section 218, permits entry on 320 acres of land which is not susceptible to irrigation at a reasonable cost. Over the years the Enlarged Homestead Act has been amended and now applies, in addition to the states listed above, to California, Kansas, North Dakota, Oregon, South Dakota, and Washington.

Although section 218 refers only to the thirteen states listed above, the Act of June 17, 1910, ^{38/} a statute similar to the Enlarged Homestead Act, allows entries of 320 acres in Idaho. The provisions of this statute are now codified as section 219. The reason for adopting a separate statute for Idaho instead of merely adding this state to the list of those covered by the Enlarged Homestead Act is unclear. However, there are few significant differences between the two statutes and the Bureau of Land Management has administered them as if the requirements were the same. Therefore, sections 218 and 219 will be treated as if they were identical and only section 218 will be discussed except where the variations warrant separate discussion of section 219.

1. Lands Subject to Entry

Section 218 (a) permits qualified entrymen to enter 320 acres, or less, of:

(N)onmineral, nonirrigable, unreserved, and unappropriated surveyed public lands which do not contain merchantable timber, located in a reasonably compact body, and not over one and one-half miles in extreme length: Provided, That no lands shall be subject to entry under the provisions of this section until such lands shall have been designated by the Secretary of the Interior as not being, in his opinion, susceptible of successful irrigation at a reasonable cost from any known source of water supply. ^{39/}

a. Nonirrigable Lands

^{37/} Act of February 19, 1909, ch. 160, 1-6, 35 Stat. 639.

^{38/} Ch. 298, secs. 1-6, 36 Stat. 531-32.

^{39/} 43 U.S.C. sec. 218(a) (1964).

The most important requirement of section 218(a) is that the lands to be entered must be nonirrigable. With regard to Idaho, section 219(a) provides that the lands must be "arid" in addition to nonirrigable. In spite of the fact that section 219(a) requires that the land be both arid and nonirrigable and section 218(a) requires only that the lands be nonirrigable, the two provisions have been interpreted identically by the Department of the Interior. Under this interpretation only lands which must be cultivated by dry farming methods may be entered under the enlarged homestead laws. The regulations state:

The terms "arid" or "nonirrigable" land, as used in these acts, are construed to mean land which, as a rule, lacks sufficient rainfall to produce agricultural crops without the necessity of resorting to unusual methods of cultivation, such as the system commonly known as dry farming, and for which there is no known source of water supply from which such land may be successfully irrigated at a reasonable cost. ^{40/}

Based upon the requirement that the entryman must cultivate not less than one-sixteenth of the area of his entry beginning with the second year, and not less than one-eighth beginning with the third year and thereafter, and the requirement that the land cannot be subject to successful irrigation, the Secretary has held that a finding of inadequate rainfall combined with a poor quality of soil which makes the land unsuitable for dry farming, will cause an application for entry to be rejected. ^{41/}

b. Requirement that the Land be Compact in Nature

Section 218(a) requires that the lands be "located in a reasonably compact body, and not over one and one-half miles in extreme length". Although the regulations echo this requirement, ^{42/} the administrative decisions have reduced the statement from an absolute prohibition to a policy limitation which may be altered if necessary. In the case of James L. Tobey, ^{43/} the entryman wished to enter lands that extended more than one and one-half miles in length. All the lands surrounding the tract applied for had been entered by others and the entryman had applied for the only vacant land available. It would have been impossible for him to apply for

^{40/} 43 C.F.R. sec. 2211.6-1(a)(2) (1968).

^{41/} Wesley Graden MacFarland, A-27384 (Interior Dec., November 16, 1956).

^{42/} 43 C.F.R. sec. 2211.6-1(a)(5) (1968).

^{43/} 48 L.D. 36 (1921).

land in a more compact form. The Secretary stated:

The limitation made in the original enlarged homestead act that the land should not extend more than one and one-half miles in extreme length was for the purpose of enforcing its further requirement that the lands covered by an entry should . . . be in one "reasonably compact body" . . .

(E)ntries such as the one here involved should be permitted and sustained in all cases where the entry is as compact as the availability of public lands will permit, notwithstanding the general rule which must be still adhered to that under other and permissible circumstances entries must be made in a compact form and can not exceed the prescribed length in cases where there are sufficient adjacent lands subject to entry. 44/

c. Additional Requirements

Section 218(a) also requires that the enlarged entry be nonmineral, unreserved, unappropriated, surveyed, and not contain merchantable timber. The requirements that the land be nonmineral, unreserved, unappropriated and surveyed are similar to requirements in the general homestead laws. However, the requirement that no merchantable timber be located on the entry is not specifically found in the general homestead laws.

Timber must constitute an important commercial feature of the land before an enlarged entry is precluded. As stated in the case of William R. Perkins: 45/

Unless the timber has merchantable value sufficient to justify a timber entry of the land, there is no impropriety of allowing entry under the enlarged homestead law provided the other conditions mentioned in the law obtain. 46/

44/ Id. at 37-38.

45/ 45 L.D. 197 (1916).

46/ Id. at 199.

The passage of the classification laws and regulations, which among other things prohibit all types of homestead entries on land found to be more valuable for timber than for agriculture, 47/ creates a situation when applied to enlarged homesteads which may not have been intended. If, under the classification procedures, land is determined to be chiefly valuable for agricultural purposes in spite of the existence of some merchantable timber, it can still be argued that such land cannot be entered under the terms of section 218(a) since this provision does not require that the land be more valuable for timber purposes than for agricultural purposes before entry is forbidden, but only that merchantable timber constitute an important commercial feature.

2. Qualifications of Entrymen

The first phrase of section 218(a) states that an enlarged homestead entry may be made by "(A)ny person who is a qualified entryman under the homestead laws". Pursuant to this provision the rules discussed in the previous chapter on general homesteads regarding the head of a family, the rights of married and single women to make entry, the effect of ownership of other land, the effect of previous entries, and the other special statutory provisions are equally applicable to the enlarged homestead laws.

In one area this reference to the general homestead laws creates a situation that may not have been intended by the drafters of the legislation. In Hoyt F. Springer, 48/ it is stated that the provision in section 161 prohibiting a person who is the proprietor of more than 160 acres from acquiring any right under the homestead law is applicable to enlarged as well as general homestead entries. This is a correct statement of the law, but, under this rule one who holds 160 acres of other land is barred from making entry under a law which is designed to permit individuals to obtain title to 320 acres of land. Under the general homestead laws it is logical to bar one who already owns more than 160 acres from obtaining additional land under a program designed to permit citizens to obtain a maximum of 160 acres from the government. However, this logic does not apply to enlarged homesteads, and it leads one to wonder if the result was the thoughtful intention of Congress in 1909.

3. The Requirements for Applying for Entry

Section 218(b) states:

47/ See discussion of the classification procedures, infra Chapter 6.

48/ A-26766 (Interior Dec., November 12, 1953).

Any person applying to enter land under the provisions of this section shall make and subscribe before the proper officer an affidavit as required by section 162 of this title and in addition thereto shall make affidavit that the land sought to be entered is of the character described in subsection (a) of this section, and shall pay the fees required to be paid under the homestead laws. ^{49/}

This provision is supplemented by section 220 which states that the application:

(S)hall be received ... and suspended until it shall have been determined by the Secretary of the Interior whether said land is actually of that character; that during such suspension the land described in said application shall be segregated by the said officer and not subject to entry until the case is disposed of; and if it shall be determined that such land is of the character contemplated by the said section, then such application shall be allowed; otherwise it shall be rejected, subject to appeal ^{50/}

Pursuant to these two provisions the requirements for an enlarged homestead entry application are generally similar to those under the general homestead laws but there are some differences. One of these differences is that the entryman must execute an affidavit showing prima facie that the land sought to be entered is arid and nonirrigable. Although the application for enlarged homestead entry also constitutes an application for designation of the land as suitable for such entry, the burden of proving that dry farming is possible is on the entryman. In the case of Paul E. Moyer ^{51/} the entryman's first application was rejected because he did not meet the burden of proving that dry farming was feasible. However, the entryman's second application was approved after he supplied proof by experts showing that dry farming operations were economically feasible on the land sought. ^{52/}

A second difference between the general and the enlarged homestead requirements is found in the provisions of section

^{49/} 43 U.S.C. sec. 218(b) (1964).

^{50/} 43 U.S.C. sec. 220 (1964).

^{51/} A-27613 (Interior Dec., December 24, 1958).

^{52/} Paul E. Moyer, A-27613 (Supp.) (Interior Dec., February 12, 1959).

220. This section requires that the land officer segregate the land applied for in an enlarged homestead, thereby making it not subject to entry by third parties until the application is either accepted or rejected. ^{53/} No such segregation occurs when an application for a general homestead is filed. However, the advantages of such segregation to an enlarged homestead applicant compared to the position of a general homestead applicant are limited. The Bureau of Land Management has always processed applications to make entry on a first come first serve basis. Therefore, even in the absence of statutory provisions similar to section 220, applicants for general homestead entries have obtained priority over later applicants in the same manner as enlarged homestead entrymen.

The case of Louise E. Johnson ^{54/} discusses an unusual fact situation in which the segregative effect of an enlarged homestead entry was significant. The case dealt with oil and gas prospecting rights. Where entry on land is made prior to an oil and gas withdrawal, the entryman has a preference right to carry out the prospecting on the land he holds as an entryman. Mrs. Johnson filed an application for designation for enlarged homestead entry. However, an oil and gas withdrawal was filed on the property after she had filed her application but before it has been approved. The Secretary indicated that the segregation provision of section 220 causes the rights of the successful enlarged homestead applicant to accrue retroactively as of the date of application rather than the date of approval of the application. Therefore, due to the segregative effect of filing the application, she obtained a preference to prospect for oil and gas. The Secretary specifically distinguished this case from a situation where segregation occurs does the right attach retroactively to the date of application.

4. Final Proof Requirements

The requirements for making final proof under the enlarged homestead laws are in most respects identical to the requirements under the general homestead laws. Section 218(d) sets out the final proof requirements by referring to section 164, governing the general homestead laws, and by specifically reiterating that the entryman must cultivate one-sixteenth of the area of his entry beginning with the second year of his entry and one-eighth beginning with the third year of his entry.

^{53/} See also, 43 C.F.R. sec. 2013.2-1 (1968); 43 C.F.R. sec. 2211.6-3(c) (1968).

^{54/} 48 L.D. 349 (1921).

a. Prohibition of Cultivation of Native Grasses

Section 218(d) says the entry must be "cultivated for agricultural crops other than native grasses", whereas the statutes governing general homesteads simply say the land must be cultivated. However, the requirement in section 218(d) that the agricultural crop be other than native grasses, while not expressly spelled out in section 164 concerning general homesteads, is an implied requirement for such homesteads today. The provisions of the Taylor Grazing Act 55/ and the Classification and Multiple Use Act of 1964 56/ provide that land may be classified for agricultural purposes only if it is more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants.

b. Nonresidence Enlarged Homesteads

Two code sections waive the residence requirements for enlarged homesteads in certain areas. The first, section 218(f), applies to land in Utah, and the second section 219(f), applies to Idaho. Section 218(f) states that:

Whenever the Secretary of the Interior shall find that any tracts of land, in the State of Utah, subject to entry under this section, do not have upon them such a sufficient supply of water suitable for domestic purposes as would make continuous residence upon the lands possible, he may, in his discretion, designate such tracts of land, not to exceed in the aggregate 2,000,000 acres, and thereafter they shall be subject to entry under this section without the necessity of residence: Provided, That in such event the entryman on any such entry shall in good faith cultivate not less than one-eighth of the entire area of the entry during the second year, one-fourth during the third year, and one-half during the fourth and fifth years after the date of such entry, and that after entry and until final proof the entryman shall reside within such distance of said land as will enable him successfully to farm the same as required by this paragraph. 57/

55/ 43 U.S.C. sec. 315(f) (1964).

56/ 43 U.S.C. sec. 1181(c) (1964).

57/ 43 U.S.C. sec. 218(f) (1964).

The provisions of section 219(f) dealing with enlarged nonresident homestead entries in Idaho differ from section 218(f) in that the total number of acres which the Secretary may designate for such entries is limited to 1,000,000 acres and the cultivation requirements are one-sixteenth of the area during the first year, one-eighth during the second year, and one-fourth during the third year and thereafter until final proof. Also, section 219(f) requires that the entryman be a resident of Idaho for the period from six months after his entry until final proof is made.

Lands that have been designated as subject to entry under either section 218(a) or 219(a) can be redesignated as subject to nonresidence enlarged homestead entry under either section 218(f) or 219(f) if, at a later date, it is found that sufficient water does not exist on the tract to supply the domestic needs of the entryman. 58/ The Department of the Interior has allowed these redesignations since classifications and designations are not permanent. 59/

However, in the absence of fraud a later discovery of sufficient water for domestic purposes will not result in a redesignation of a nonresidence enlarged homestead to a regular enlarged homestead. In the case of Web Green 60/ the Secretary stated:

While it is believed that a designation or classification of lands under the act involved is not necessarily conclusive, nevertheless, . . . where entry is made under the provisions of section six (43 U.S.C. sec. 218(f) (1964)), upon the faith and in full reliance upon the correctness of the designation of the lands as falling within the class as prescribed by law such designation or classification should not thereafter be modified to the injury of any one who in good faith has acted upon such designation. . . .

It is quite certain that it was not the intention of Congress to retard the possible development of any section of the country, and this Department will not so administer the law as to preclude entrymen from making such efforts as they may desire to secure water upon lands entered by them under this act, and to hold

58/ Norman T. Hallanger, 40 L.D. 487 (1912).

59/ Theodore Mott, 39 L.D. 33 (1910).

60/ 38 L.D. 586 (1910).

that the discovery of a means whereby water may be secured will necessitate a change in the character of the entry, would, unquestionably, prevent entrymen from endeavoring to secure water. 61/

The provisions dealing with native grasses and nonresidence enlarged entries are the only major substantive variations in final proof requirements between the enlarged homestead laws and the general homestead laws. In addition, however, it should be noted that no entry under the enlarged homestead laws may be commuted. 62/

5. Additional Enlarged Entries

There are three types of additional entry under the enlarged homestead laws. They are: (1) an additional entry after obtaining a homestead patent for land which would not have been subject to an enlarged homestead entry, (2) an additional entry of a parcel contiguous to an original entry on land subject to enlarged homestead entry, and (3) an additional entry of noncontiguous land after submitting final proof for land subject to an enlarged homestead entry. These three forms of additional enlarged entry, which can be confusing to say the least, are discussed in order below.

a. Additional Enlarged Entry After Obtaining a Patent for Land Which Would Not Have Been Subject to an Enlarged Homestead Entry

Section 215 states that:

Any person otherwise qualified who has obtained title under the homestead laws to less than one quarter section of land may make entry and obtain title under the provisions for enlarged homesteads, for such an area of public land as will, when one-half of such area is added to the area of the lands to which he has already obtained title, not exceed one quarter section. . . . 63/

This section is the least favorable of the additional entry provisions, as the least amount of acreage can be obtained and the most stringent conditions for final proof are required. Since the least acreage can be obtained, the provisions of section 215 will generally be used only when the original entry was not on land subject to an enlarged

61/ Id. at 587.

62/ 43 U.S.C. sec. 218(e) (1964); 43 U.S.C. sec. 219(e) (1964).

63/ 43 U.S.C. sec. 215 (1964).

homestead. Therefore, an entryman who obtains title to additional land under this section will own a certain amount of land which is not arid or semiarid or is susceptible of successful irrigation at a reasonable cost and an additional amount of land which is arid and not susceptible of such irrigation.

To illustrate, if a person has obtained title to 40 acres which could not have been obtained under the enlarged homestead laws because it is susceptible of irrigation or is not arid or semiarid in nature, he may make additional entry on 240 acres of land designated as proper for enlarged homesteads. One hundred and twenty acres (one-half of 240 acres) plus the 40 acres he already holds would equal 160 acres; the limit under section 215.

An application to make additional entry under section 215 must contain a petition for designation of the land sought the same as in other cases under the enlarged homestead laws. 64/

The provisions of section 215 require the entryman to comply with the provisions for enlarged homestead entries in order to obtain title to the additional entry. Pursuant to this statutory provision, the regulations 65/ spell out the requirements for final proof on the additional entry by listing all the requirements of a regular enlarged homestead entry including the construction of a habitable house, residence, and the requisite amount of cultivation. In other words, according to the regulations a habitable house must be constructed and residence made on the additional entry even though the entryman already has a house on his original entry. This requirement of a second home is one more reason why this kind of additional entry is the least desirable of the three types. The other types of additional entries do not require a second home.

b. Contiguous Additional Enlarged Entries

Section 218(c) states that:

Any person who has made, or shall make, homestead entry of lands of the character herein described, and who has not submitted final proof thereon, or who having submitted final proof still owns and occupies the land thus entered, shall have the right to enter public lands, subject to the provisions of

64/ 43 C.F.R. sec. 2211.6-6(e) (1968).

65/ 43 C.F.R. sec. 2211.6-6(g) (1968).

this section, contiguous to his first entry, which shall not, together with the original entry, exceed three hundred and twenty acres: Provided, That the land originally entered and that covered by the additional entry shall have first been designated as subject to this section, as provided by subsection (a) of this section. 66/

The right to make a contiguous additional enlarged homestead entry is available to anyone who has made a homestead entry of any type. This right is not limited only to those whose original entry was for an enlarged homestead. However, anyone whose first entry was not an enlarged homestead must have made his original entry on land suitable for enlarged homesteads. In other words, while the original entry may have been pursuant to the general homestead laws, it had to be on land that could have been entered under the enlarged homestead laws.

(1) Final Proof Requirements

Section 218(d) outlines the final proof requirements for these contiguous additional entries. It is a long, complex section dealing primarily with cultivation and residence requirements, and sets forth three basic methods of complying with the final proof requirements. 67/ The regulations help

66/ 43 U.S.C. sec. 218(c) (1964).

67/ The text of 43 U.S.C. sec. 218(d) (1964) is, in part, as follows: "(A)ny qualified person who has prior to February 19, 1909, made, or who thereafter makes, additional entry under the provisions of subsection (c) of this section to an entry upon which final proof has not been made, may be allowed to perfect title to his original entry by showing compliance with the provisions of section 164 of this title, respecting such original entry, and thereafter in making proof upon his additional entry shall be credited with residence maintained upon his original entry from date of such original entry, but the cultivation required upon entries made under this section must be shown respecting such additional entry, which cultivation, while it may be made upon either the original or additional entry or upon both entries, must be cultivation in addition to that relied upon and used in making proof upon the original entry; or, if he elects, his original and additional entries may be considered as one, with full credit for residence upon and improvements made upon his original entry, in which event the amount of cultivation herein required shall apply to the total area of the combined entry, and proof may be made upon such combined entry whenever it can be shown that the cultivation required by this section has been performed; and to this end

note continued

clarify some of the complex language of the statute. 68/ In each of the three methods residence upon the original entry fulfills the residence requirements for the additional entry, but the cultivation requirements differ depending upon the circumstances.

First, if the additional entry is made before final proof has been made on the original entry, the entryman can elect to perfect title to his original entry by complying with the general homestead laws and thereafter meeting the cultivation requirements for the additional entry. Under this method one-sixteenth of the original entry must be cultivated during the second year after such entry and one-eighth during the third year. The cultivation requirements for the additional entry are one-sixteenth of the additional area during the second year after that entry and one-eighth during the third year. The cultivation required for the additional entry can be made either on the original or additional entry or on both, but it must be in addition to the cultivation relied upon in making proof for the original entry.

note 67, continued

the time within which proof must be made upon such a combined entry is hereby extended to seven years from the date of the original entry: Provided further, That where an entry is made as additional to an entry upon which final proof has theretofore been submitted by an entryman who still owns and occupies the land thus entered, the entryman in making proof upon his additional entry shall be credited with residence maintained upon his original entry from date thereof, but the cultivation required upon entries made under this section must be shown respecting such additional entry and must be performed upon the land included therein to the extent and for the period required in connection with the original entries under this section, proof of which must be submitted within five years from and after the date of the additional entry: Provided further, That nothing herein contained shall be so construed as to require residence upon the combined entry in excess of the period of residence as required by section 164 of this title."

68/ 43 C.F.R. sec. 2211.6-4 (1968).

Second, the entryman can elect to submit final proof for both entries at the same time and treat them as a combined entry. In this case he must show cultivation of one-sixteenth of the combined area for one year and an increase in cultivation to one-eighth of the combined area in the succeeding year. Neither the statute nor the regulations indicate when cultivation of the combined entry must be done with respect to the date of the original entry, but presumably at least one-sixteenth of the original entry must be cultivated not later than the second year after the original entry and one-eighth of the original entry must be cultivated from the third year after the original entry until final proof is filed for the combined entry. The regulations do provide that the required amount of cultivation for the combined entry may have been performed on the original entry before the additional entry was made. ^{69/} Thus, under this method if the entryman cultivates more than the minimum amount required for his original entry he can credit the excess towards fulfilling the requirements for the subsequently entered additional area by treating the two entries as one. Also, under this method the entryman is given seven years from the date of his original entry in which to make final proof for the combined entry.

The third method of making final proof under section 218(d) covers the situation where an entryman owning and occupying his original entry makes his additional entry after he has made final proof on the original entry. In this case the cultivation required for the additional entry must be made on the additional entry.

These distinctions do not appear to have been the subject of much litigation. At least no relevant cases have been found dealing with the differences of the three situations. However, the complexity of the law is a good example of the intricacies to which Congress has sometimes resorted in order to permit people to get more acreage without having to repeal or amend the acreage limitation laws.

(2) Other Requirements

The statute requires that the applicant for a contiguous additional enlarged entry own or occupy the lands covered by the original entry. ^{70/} This requirement is identical to that found in the general homestead laws. ^{71/} In the case of Balente Luna ^{72/} the entryman had sold a portion of the original entry but the portion still owned and occupied was

^{69/} 43 C.F.R. sec. 2211.6-4(a)(4) (1968).

^{70/} 43 U.S.C. sec. 218(d) (1964).

^{71/} See discussion, p. 68, supra.

^{72/} 46 L.D. 28 (1917).

contiguous to the additional parcel which the entryman proposed to enter. The Secretary held that the partial sale of the original entry would not foreclose the additional entry. The Secretary indicated that the requirement that the entryman own and occupy his original entry should be liberally construed in favor of the entryman.

The Luna case does not discuss the question of how much additional land may be entered. However, the limit of the additional right would have to be governed by the original acreage entered and not by what was owned after a partial sale. This reasoning is based on section 212 which limits the aggregate amount of acreage which may be acquired under all the homestead laws to 320 acres.

The case of Mallmann v. Halff (On rehearing) ^{73/} holds that if the original entry is intact and the maximum period for filing final proof has not expired, the entryman has the right to make a contiguous additional entry thereto whether or not he has complied with the law as to his original entry. The additional entry, if allowed, can be perfected even though the original entry is later cancelled.

c. Additional Enlarged Entry on Noncontiguous Land After Submitting Proof for Land Subject to an Enlarged Homestead Entry.

Section 218(g) permits an additional enlarged entry of noncontiguous land under the following circumstances:

Any person who has made or shall make homestead entry of less than three hundred and twenty acres of lands of the character described in this section, and who shall have submitted final proof thereon, shall have the right to enter public lands subject to the provisions of this section, not contiguous to his first entry, which shall not with the original entry exceed three hundred and twenty acres: Provided, That the land originally entered and that covered by the additional entry shall first have been designated as subject to this section as provided by subsection (a) of this section: Provided further, That in no case shall patent issue for the land covered by such additional entry until the person making same shall have actually and in conformity with the homestead laws resided upon and cultivated the lands so

^{73/} 46 L.D. 164 (1917).

additionally entered, and otherwise complied with such laws, except that where the land embraced in the additional entry is located not exceeding twenty miles from the land embraced in the original entry no residence shall be required on such additional entry if the entryman is residing on his former entry: And provided further, That this section shall not be construed as affecting any rights as to location of soldiers' additional homesteads under section 274 of this title. 74/

This section permits two types of entries. First, it permits anyone who has made a previous original enlarged entry for less than 320 acres to make an additional entry which will bring the total acreage obtained under the enlarged homestead laws up to 320 acres. Second, the provision permits one who has made a general homestead entry on arid or semiarid land which is nonirrigable to obtain more land up to a total of 320 acres for both entries.

In order to qualify for the noncontiguous additional enlarged entry, the applicant need not own or occupy the original tract. 75/ This is a difference between the noncontiguous and contiguous additional enlarged entries. However, even if he does not own or occupy the original tract, that original tract must still be designated as nonirrigable, since the original tract must qualify for enlarged homestead entry before the additional entry under this section can be made.

d. Rights of Widows and Heirs to Make Additional Entry

Sections 218(c) and 218(g) permit a person who has made an original entry to make an additional entry. The cases have interpreted these provisions to mean that only the original entryman can make additional entries. Successors in interest or the entrymen's widows and heirs may not make additional enlarged entries. 76/ The cases reason that widows and heirs do not need the right to make an additional enlarged entry since they still hold the right to make an original entry on their own behalf. This is the same rationale used to deny widows and heirs the right to make additional entries under the general homestead laws. However, in the case of enlarged homesteads the reasoning behind the rule is faulty because widows or heirs cannot always make original entries on their

74/ 43 U.S.C. sec. 218(g) (1964).

75/ 43 C.F.R. sec. 2211.6-5(c) (1968).

76/ Timothy Sullivan, guardian of Juanita Elsenpeter, 46 L.D. 110 (1917).

own behalf.

Under the general homestead laws widows and heirs are always able to make an original entry on their own behalf, because the maximum size of any general homestead which they may inherit is 160 acres and anyone not owning more than 160 acres can make an original entry on his own. 77/ However, in the case of enlarged homesteads it is possible to inherit more than 160 acres, and anyone holding title to more than 160 acres is disqualified from making an enlarged homestead entry. 78/ This disqualification makes the inability of a widow or heir to obtain an additional enlarged entry somewhat inequitable. If a widow or heir holds title through a deceased enlarged homestead entryman to more than 160 but less than 320 acres of land he or she can neither make an additional nor an original enlarged entry; the first is precluded because of the rule against widows and heirs being allowed to make additional entries, and the second because they cannot qualify as entrymen due to their owning more than 160 acres. The only way such individuals could bring their holdings to the statutory maximum of 320 acres would be to dispose of the land inherited and start again from the beginning with a new original entry.

e. Second Additional Entries

The case of William B. Ketchum, 79/ dealing with the general homestead laws, held that only one additional entry may be made even if that additional entry does not bring the total land holdings up to 160 acres. However, there are cases which indicate that this rule does not apply to enlarged homesteads and that more than one additional enlarged homestead entry may be made.

In the case of Richard O. Lunke 80/ the entryman applied for a second contiguous additional entry after having already perfected one such entry. The Secretary allowed the second additional entry stating that the land being sought was not subject to entry when the first additional entry was made. Under this circumstance the Secretary stated:

77/ 43 U.S.C. sec. 161 (1964).

78/ Section 161, pertaining to general homesteads, forbids homestead entry by any person who holds title to more than 160 acres of other land. As stated above, the qualifications for an entryman for an enlarged homestead are the same as those for a general homestead. Therefore, the provisions of section 161 govern who may make an original enlarged homestead entry.

79/ 48 L.D. 144 (1921).

80/ 51 L.D. 581 (1926).

(T)he Department has concluded that the manner in which the prior entries were perfected is not controlling, the only limitation of section 3 (43 U.S.C. sec. 218(c) (1964)) of the enlarged homestead act being as to the area which may be acquired thereunder. 81/

Another example of the procedure used to enable more than one additional entry to be made is the case of George M. Ingebo 82/ in which the entryman had perfected a general homestead entry for 40 acres and had thereafter perfected an additional entry under section 214 which permits noncontiguous additional entries under the general homestead laws. The entryman then applied for a second additional entry, this time under the provisions of section 215. Section 215 is the one which permits a person to obtain as an additional enlarged homestead an area which, when one-half of it is added to the area of land already obtained, will not exceed one quarter section. The Secretary allowed this second additional entry stating that it would be in the nature of an amendment to the first additional entry. What the Secretary did in this case was to convert a section 214 general homestead additional entry into a section 215 enlarged homestead additional entry and allow the converted first additional entry to be amended to include more land even though the first additional entry had already been perfected and patented.

In the case of Albert G. Carson 83/ the entryman applied for a noncontiguous additional entry after applying for, receiving, but not having perfected, a previous contiguous additional entry. The Secretary held that the noncontiguous additional entry should be allowed, reasoning that if additional contiguous land is not available so as to allow the entryman to obtain a total of 320 acres, a simultaneous entry for noncontiguous land can also be made if it is possible for the entryman to meet the requirements to perfect both additional entries simultaneously. Of course, only 320 acres can be perfected under all entries.

In light of the numerous cases which state that the enlarged homestead laws are part of the general provisions of the homestead laws and subject to the practice, regulations, and decisions applicable thereto, 84/ the inconsistency between the

Lunke, Ingebo and Carson decisions discussed above, which allow second additional entries under the enlarged homestead laws, and the decision in William B. Ketchum 85/ discussed at the beginning of this section, which forbids second additional entries under the general homestead laws, does not appear justified.

f. Miscellaneous Requirements for Additional Enlarged Entries

According to the case of Milton L. Hinds (On reconsideration) 86/ unless the entire original entry can be designated as subject to enlarged entry, neither a contiguous nor a noncontiguous additional entry can be made under sections 218(c) or 218(g). Therefore, if only a part of the original homestead land is designated as qualified for an enlarged entry, an additional entry can be made only under the provisions of section 215.

The general married woman's disqualification discussed in Chapter 1 87/ does not apply to additional entries if such entry is additional to land properly entered prior to her marriage. 88/

The qualifications of section 161 which forbid one from making entry if he holds title to more than 160 acres of other land do not apply to additional entries. In the case of Robert Hildreth 89/ the entryman acquired 1,760 acres of land after making his enlarged homestead entry. The subsequent acquisition of this land did not disqualify him from making an additional entry under section 218(c).

6. The Kinkaid Act

Of historical interest in any discussion of enlarged homesteads is the Act of April 28, 1904, 90/ commonly known as the Kinkaid Act which, on its face, permits entries up to 640 acres in northwestern Nebraska on lands which are not susceptible of irrigation. This act also allows entrymen who have made previous homestead entries either within or without the affected area of Nebraska to make new additional entries on

85/ 48 L.D. 144 (1921).

86/ 49 L.D. 263 (1922).

87/ See pp. 13 15, supra

88/ Alice C. St. John, 38 L.D. 577 (1910).

89/ 51 L.D. 266 (1925).

90/ Ch. 1801, secs. 1-3, 33 Stat. 547-48 (codified as amended at 43 U.S.C. sec. 224 (1964)).

81/ Id. at 582.

82/ 46 L.D. 431 (1918).

83/ 46 L.D. 84 (1917).

84/ See for instance Scribner v. Love, 53 I.D. 23 (1930).

amounts of land which when added to the land they have previously entered will not exceed 640 acres.

In general, the requirements for patent are the same as for general and enlarged homesteads. The only major difference is that section 224(c) requires that the entryman affirmatively prove that he has placed upon the land improvements valued at not less than \$1.25 per acre for each acre included in the entry.

Section 7 of the Taylor Grazing Act of 1934 ^{91/} reduced the amount of acreage which can be obtained under the Kinkaid Act from 640 acres to 320 acres. That section provides for the classification and opening of lands suitable for the production of agricultural crops "except that homestead entries shall not be allowed for tracts exceeding three hundred twenty acres in area". ^{92/} As a result of this legislation, 640-acre entries are no longer permissible.

One question is raised by this provision of the Taylor Grazing Act, which is codified as section 315(f). Prior to its passage anyone who had made a previous entry was allowed to enter Kinkaid lands provided that the total entered when added to the amount previously entered did not exceed 640 acres. Today, if an entryman has previously entered 160 acres of non-Kinkaid lands and is now attempting to enter additional lands under the Kinkaid Act, the question arises as to whether he would be permitted to enter 160 or 320 acres of additional land. It is not clear from the language in section 315(f) whether the total limit on all homestead entries is 320 acres or whether the limit applies only to each tract entered but permits entries of more than one tract.

The passage of section 315(f) has made the Kinkaid Act largely a matter of historical interest only, since enlarged homestead entries of 320 acres can be made under section 218 anyway. The only way the Kinkaid Act might still be useful is if section 315(f) is interpreted to mean 320 acres of additional land can be entered by one who has made a previous homestead entry. If that is the correct interpretation, more land could be obtained under the Kinkaid Act than under the enlarged homestead laws. But even then, the Kinkaid Act is still probably of only historical importance. As of June 30, 1966, the public domain held by the Bureau of Land Management in Nebraska totaled only 7,825 acres.

^{91/} Act of June 28, 1934, ch. 865, sec. 7, 48 Stat. 1272 (codified as amended at 43 U.S.C. sec. 315(f) (1964)).

^{92/} Id.

D. Reclamation Homesteads

The Reclamation Act of 1902 ^{93/} and its subsequent amendments are considered one of the most important contributions to the agricultural development of the arid west. ^{94/} In the period from 1902 until the advent of World War II some 52,848 farm entries involving over 2,000,000 acres were made within Federal reclamation projects. ^{95/} In the post-World War II period through 1958, an additional 2,842 farm openings were created with a combine acreage of 264,240. ^{96/}

Along with other types of public land entries, reclamation homesteads have been of diminishing significance in recent years. Although substantial Congressional appropriations for reclamation projects are made annually, the purpose of these projects is no longer primarily to benefit public lands which will then be open to homesteaders. Instead, they are massive multi-purpose projects which typically provide flood control, serve water to largely private agricultural lands, supply domestic and industrial water and generate hydroelectric power.

The provisions of reclamation law are extremely long, technical and detailed. They contain many sections and cover a variety of subjects of which reclamation homesteads is only one. Such topics as the Small Reclamation Projects Act and water service to private landowners are covered by reclamation law, but are beyond the scope of this study. Therefore, only those code provisions which deal directly or indirectly with reclamation homesteading are discussed in this chapter.

1. Land Subject to Entry

a. Reclamation Withdrawals

Section 416, as originally enacted, authorized the Secretary of the Interior to completely withdraw from entry any public lands which may be required for the construction of irrigation works and to withdraw from entry, except under the homestead laws, any public lands which may be susceptible of irrigation from such irrigation works. However, section 436, adopted in 1910, partially amends section 416 so that no

^{93/} The Act of June 17, 1902, 32 Stat. 388 (codified generally as amended at 43 U.S.C. §371 et seq. (1964)).

^{94/} See, for example, Gates & Swenson, History of Public Land Law Development 654-98 (1968).

^{95/} Id. at 692.

^{96/} Id.

entry of any type may be made until the Secretary has decided how much acreage to allot to each individual entryman and until the water is ready to be delivered to the land. This means that the lands are completely withdrawn, even to homestead entry, until the government project is complete.

The 1910 passage of section 436 was necessary to end the common practice of entering land near a potential Federal project for speculative purposes long before the reclamation works were constructed and therefore, long before the land could be settled and cultivated. 97/

b. The Effect of Minerals on the Availability of Reclamation Homesteads

The existence of certain minerals within the boundaries of a reclamation homestead withdrawal has the same effect as under the general homestead and desert land laws. The existence of phosphate, nitrate, potash, oil, gas or asphaltic minerals will not foreclose reclamation homestead entries. However, the entryman must agree to take his patent subject to a reservation to the United States of these minerals. 98/

c. Acreages Limitations

As was noted above, section 436 states that no reclamation homestead entry may be made until the water is ready to be delivered to the land and the Secretary has established the acreage to be permitted per entry. Section 419 requires the Secretary to limit the acreage of each entry to that which may be reasonably required for the support of a family upon the lands in question. This procedure for determining the area of entry, known as establishing "farm units", is more specifically dealt with in section 434 which states:

Public land which it is proposed to irrigate by means of any contemplated works shall be subject to entry in tracts of not less than forty nor more than one hundred and sixty acres: Provided, That whenever, in the opinion of the Secretary of the Interior, by reason of market conditions and the special fitness of the soil and climate for the growth of fruit and garden produce, a lesser area than forty acres may be sufficient for the support of a family on lands to be irrigated under the provisions of the reclamation law, he may fix a lesser area than

97/ See Id. at 654-66, for a discussion of the speculation problems encountered on the early reclamation projects.

98/ See Chapter 1, pp. 8-11 and Chapter 3, p114

forty acres as the minimum entry and may establish farm units of not less than ten nor more than one hundred and sixty acres Provided, That an entryman may elect to enter under said reclamation law a lesser area than the minimum limit in any State or Territory. 99/

Pursuant to the authority granted by this provision, the Secretary of the Interior may establish farm units of not less than ten acres. However, the section gives the entryman additional authority to enter less than the minimum area established by the Secretary if he so desires. The regulations elaborate on this option by stating:

The farm units may be as small as 5 acres where the lands are suitable for fruit raising, etc., but as a rule they are fixed at from 40 to 160 acres each. 100/

The entryman may elect to enter less than the minimum farm unit only when the smaller unit is sufficient, if carefully managed, to return to the reclamation fund the charges apportioned to the irrigable area thereof. 101/

In certain circumstances, a farm unit may exceed 160 acres so long as the irrigable area of the entry does not exceed 160 acres. Section 451(h) states:

In administering sections 434, 448, and 544 of this title, the Secretary may to the extent found necessary as shown by a land classification to provide farm units sufficient in size to support a family, establish such units of not more than three hundred and twenty acres containing not more than one hundred and sixty irrigable acres designated by him and may permit entry and assignment under the homestead laws. . . . 102/

The acreage limitation provisions of the reclamation homestead laws are significantly different from those found in the other public land entry statutes discussed in this study. The decision as to the amount of land which may be

99/ 43 U.S.C. §434 (1964).

100/ 43 C.F.R. §2211.7-1(d)(3) (1968).

101. 43 C.F.R. §2211.7-1(d)(1) (1968).

102/ 43 U.S.C. §451(h) (1964).

entered is left, not to the entryman, but to the Secretary of the Interior based upon the Secretary's determination of the acreage necessary for the support of a family. Since, reclamation homestead farm units are burdened with those payments necessary to reimburse the reclamation fund for the cost of constructing reclamation works, a self-sufficient farm unit is one which can both support a family and return to the reclamation fund the charges apportioned to the irrigable area of the entry. 103/

2. Qualifications of Entrymen

Section 432 states that lands to be irrigated under the reclamation laws shall be subject to entry only under the provisions of the homestead laws. Therefore, the prospective entryman must, as a minimum, meet the basic requirements which were discussed in Chapter 1 on general homesteads. 104/ In addition, however, section 433 establishes requirements for reclamation homestead entrymen as to their character and capital qualifications. The section states:

The Secretary is authorized, under regulations to be promulgated by him, to require of each applicant including preference right ex-service men for entry to public lands on a project, such qualifications as to industry, experience, character, and capital, as in his opinion are necessary to give reasonable assurance of success by the prospective settler. . . . 105/

Section 433(a) should also be noted at this point. It was added in 1940 and declares it to be the policy of Congress that a preference should be given to needy families who have no other means of earning a livelihood or have been compelled to abandon other farms in the United States and with respect to whom it appears that there is probability that such family will be able to earn a livelihood on such irrigated land. This provision seems to conflict with section 433 which allows the Secretary to require that the entrymen have certain experience and capital. In light of the regulations discussed below, which require a great deal of capital, a preference for needy families does not seem to exist.

The last sentence of section 433 authorizes the Secretary to appoint boards composed in part of private citizens to assist in the selection of qualified entrymen. Under the

103/ 43 C.F.R. §2211.7-1(d)(1) (1968).

104/ See Chapter 1, pp. 12-17

105/ 43 U.S.C. §433 (1964).

authority granted by this provision, the Secretary has established regulations delegating the authority to appoint such boards to the Commissioner of Reclamation. These regulations provide that such boards shall consist of not less than two citizens residing on or in the vicinity of the project who are deemed to have a public-spirited interest in successful development of the project and the welfare of the settlers. A third board member shall be a Bureau of Reclamation official. If, in view of the volume of the work or the variety of the problems involved in the selection of the settlers, the Commissioner of Reclamation feels that more than three board members are necessary, he may appoint additional citizen members. 106/

The duties of the board include recommending for approval by the Secretary of the Interior the amount of capital to be required of applicants, the examination, approval, or rejection, in accordance with established procedures, of applications for reclamation homestead entry, and recommendation to the Commissioner of Reclamation or other qualified officials concerning any matters connected with the settlement of the project. 107/

The regulations broadly establish the minimum qualifications for entrymen. An applicant must be possessed of honest, temperate habits, thrift, industry, seriousness of purpose, record of good moral conduct, and a bona fide intent to engage in farming as an occupation. 108/ Further, he must have a minimum of two years full-time farm experience consisting of participation in actual farming operations after attaining the age of fifteen years. One year of this required experience is not necessary if the prospective entryman can substitute therefor time spent studying agricultural courses in an accredited agricultural college or time spent working with farming related subjects such as teaching vocational agriculture or similar subjects. However, each academic year of schooling or teaching is equal to only six months of actual experience, and substitutions of this type will not be allowed for more than one year of full-time farm experience. Therefore, at least twelve months of actual farm experience are necessary. 109/

The regulations go on to state that applicants who have acquired their experience on irrigated farms will not be given a preference over those whose experience was acquired on a nonirrigated farm. However, all applicants must demonstrate experience of such a nature as will demonstrate that the

106/ 43 C.F.R. §401.6(a) (1968).

107/ 43 C.F.R. §401.6(c) (1968).

108/ 43 C.F.R. §401.7(a) (1968).

109/ 43 C.F.R. §401.7(b) (1968).

applicant is qualified to undertake development and operation of an irrigated farm by modern methods. 110/ Also, an applicant must be in such physical condition as will enable him to engage in normal farm labor. 111/

As stated above, the statute and regulations require that the entryman possess a certain amount of capital. The regulations state that the minimum amount of cash, or assets readily convertible into cash, or assets such as livestock or farm machinery which will be useful in development and operation of a new farm, will be determined by the board based upon its determination of the minimum needed in the area to be developed. The regulations state:

In considering the practical value of property which will be useful in the development of a farm, the board will not value household goods at more than \$500 or a passenger car at more than \$500. If the applicant proposes to convert items into cash, total cash value of such items should be shown with a full explanation. An applicant may be required, as provided in §401.15, to furnish a certified financial statement showing all of his assets and all of his liabilities. Assets not useful in the development of a farm will be considered if the applicant furnishes, at the board's request, evidence of the value of the property and proof of its conversion into useful form before the issuance of a certificate of qualification. 112/

The introductory paragraph of section 401.7 of the regulations 113/ states the philosophy behind the qualification requirements and the ramifications of failing to meet them.

The minimum qualifications set forth in paragraphs (a) to (d) of this section are necessary to give reasonable assurance of success of an entryman or entrywoman on a reclamation farm unit. Applicants must, in

110/ Id.

111/ 43 C.F.R. §401.7(c) (1968).

112/ 43 C.F.R. §401.7(d) (1968). Although the quoted regulation is still found in the latest Code of Federal Regulations, the Bureau has stated it no longer follows this rule. The most recently issued public notices give no credit for automobiles or household goods.

113/ 43 C.F.R. §401.7 (1968).

the judgment of the examining board, meet these qualifications in order to be considered for entry. Failure to meet them in any single respect will be sufficient cause for rejection of an application. No credit will be given for qualifications in excess of the required minimum. 114/

3. Application for Entry

a. Application for Certificate of Qualification

The opening of public land within a Federal reclamation project is announced by the Secretary of the Interior by public notice published in the Federal Register. The announcement is then disseminated as widely as possible through established news media and by direct mail to those persons who have requested such information. 115/

The lands open to entry pursuant to each notice are divided into farm units as discussed above. After the farm units are established and the notice of opening of lands is published, the procedure for choosing among the applicants begins. The regulations deal at length with the subject of veterans' preferences. These preference provisions previously codified in sections 279, 280 and 281, expired in 1959, and although reference to them has not been deleted from the regulations, they are no longer applicable.

A person desiring to enter a farm unit must complete an application form. 116/ All complete applications filed prior to the date specified in the public notice are treated as simultaneously filed, and are given first priority. 117/ All applications filed after this specified date are considered in the order in which they are received, if any farm units remain after the first priority group has been processed. 118/

The board conducts a drawing of applicants in the first priority group. The names of a sufficient number of applicants (not less than four times the farms units to be awarded) and drawn for the purpose of establishing the order in which the applications will be examined to determine eligibility. 119/

114/ Id.

115/ 43 C.F.R. §401.1 (1968).

116/ 43 C.F.R. §401.10 (1968). A copy of the form may be found in Appendix B, p. B-11, et seq.

117/ 43 C.F.R. §401.13(b) (1968).

118/ 43 C.F.R. §401.13(c) (1968).

119/ 43 C.F.R. §401.14 (1968).

Those applicants whose names are drawn are supplied forms on which to submit evidence of qualification. The completed form must be mailed or delivered to the appropriate office of the Bureau of Reclamation within 30 days after the form is mailed to the last known address furnished by the applicant. 120/

The board then determines from the answers supplied whether the applicant appears to meet the qualifications. If the examination indicates that he does, the applicant may be required to appear for a personal interview. This interview allows the board to obtain any additional information it may desire, and affords the applicant the opportunity to obtain any information he desires relative to conditions in the area, and an opportunity to examine the farm units. If the applicant fails to appear for the personal interview, he forfeits his priority as established by the drawing. 121/

The applicants are notified if they have qualified for entry. Such applicants then successively exercise the right to select the farm unit in accordance with the priority established by the drawing. 122/ Failure to select within the time specified by the board will cause the applicant to forfeit his position in the priority group. His name will then be placed last in that group. 123/

If any farm units remain after all the qualified selected names have had an opportunity to choose a farm unit, there will be a second drawing from any names remaining in the first priority group and the same procedure will be followed with regard to these applicants. 124/ If any farm units remain after the first priority group has been exhausted, the second group of applications is processed, in the order of their receipt.

Pursuant to section 471, the applicant must pay an initial installment equal to 5 percent of the construction charge fixed for the farm unit he has chosen before the certificate of qualification will be issued. 125/ In addition the entryman must pay other filing fees or charges due. 126/

120/ 43 C.F.R. §401.15 (1968).

121/ 43 C.F.R. §401.16 (1968).

122/ 43 C.F.R. §401.17 (1968).

123/ 43 C.F.R. §401.18 (1968).

124/ 43 C.F.R. §401.19 (1968).

125/ See also, 43 C.F.R. §401.19 (1968).

126/ Id.

b. Application for Homestead Entry

Once the applicant has obtained the certificate of qualification, the procedure for applying for entry is identical to the procedure for applying for any other homestead entry, with the exception that the certificate of qualification must be attached to the entry application. Since, as a general rule, most of the problems which arise when homestead entry is requested have been settled before the certificate of qualification has been issued, the approval of the application for entry under the homestead laws generally occurs as a matter of form.

4. Final Proof Requirements

The final proof requirements for reclamation homesteads are a combination of requirements established by the general homestead laws and additional requirements established by certain provisions of reclamation law. Generally, two final proofs are filed at separate times.

a. Homestead Proof

Section 439 requires the entryman to comply with the homestead laws and, in addition, reclaim at least one-half the total irrigable area of his entry for agricultural purposes. On its face, this provision, along with section 432, requires the reclamation homestead entryman to carry out all requirements of general homestead proof established by section 164. To fulfill the general homestead proof requirements the entryman must: Establish residence on the land within 6 months unless a 6 month extension is granted; reside on the land for 7 months a year for 3 consecutive years (unless reduced as a credit for military service); construct a habitable house on the entry; and cultivate one-sixteenth of the land the second year and one-eighth of the land the third year and until final proof. 127/ The reclamation homestead regulations echo the requirement that all aspects of general homestead proof must be met:

All persons who make entry of lands within the irrigable area of any project commenced or contemplated under the reclamation law will be required to comply fully with the homestead law as to residence, cultivation, and improvement of the lands. . . . 128/

In spite of section 432 and 439 and the regulation quoted above, section 440, adopted in 1914, as interpreted by the Bureau of Land Management, appears to eliminate the requirement that homestead proof include evidence of cultivation.

127/ Section 436 provides that the commutation provisions of section 173 do not apply to reclamation homesteads.

128/ 43 C.F.R. §2211.7-6(a) (4) (1968) (emphasis added).

Section 440 states:

The Secretary of the Interior is authorized to make general rules and regulations governing the use of water in the irrigation of the lands within any project, and may require the reclamation for agricultural purposes and the cultivation of one-fourth the irrigable area under each water-right application or entry within three full irrigation seasons after the filing of water-right application or entry, and the reclamation for agricultural purposes and the cultivation of one-half the irrigable area within five full irrigation seasons after filing of the water-right application or entry, and shall provide for continued compliance with such requirements. 129/

In a document entitled Information for Prospective Reclamation Homestead Entrymen, dated August 31, 1948, Marion Clawson, then the Director of the Bureau of Land Management, stated his interpretation of the effect of section 440 on the homestead proof cultivation requirements for reclamation homesteads:

Final homestead proof must be made within 5 years from the date of the allowance of the entry. Such proof must show that there is a habitable house upon the land at the time the proof is submitted, that the residence requirements have been met, that the improvements are of such a character as to show good faith and that the entryman is a citizen of the United States. Cultivation need not be shown at the time of the submission of the final homestead proof. 130/

The reasoning behind this statement was clarified in another document entitled, Procedure, Reclamation Homestead, also issued by Director Clawson in August of 1948, in which he stated:

The requirement of the homestead law as to cultivation does not apply and need not be shown by the homestead proof, as cultivation is a statutory requirement of the reclamation law. 131/

129/ 43 U.S.C. §440 (1964).

130/ M. Clawson, Information for Prospective Reclamation Homestead Entrymen 3 (August 31, 1948).

131/ Bureau of Land Management, Dept. of the Interior, Procedure, Reclamation Homesteads 5 n. 1, (August 3, 1948).

Thus, although it is possible to interpret section 440 and sections 432 and 439, in a harmonious manner so as to require homestead cultivation, up to the beginning of the third full irrigation season and section 440 cultivation thereafter, the Bureau of Land Management has interpreted the statutes as being inconsistent, and has ruled that section 440 overrides the general homestead law cultivation requirements. Accordingly, cultivation need not be shown when homestead proof is submitted.

Homestead final proof must, of course, be filed within five years after entry. It must be filed prior to or simultaneously with reclamation final proof. Patent does not issue upon the filing of homestead final proof, but must await completion of the additional requirements established by reclamation law.

b. Reclamation Proof

Section 439 was adopted in 1902 as part of the original Reclamation Act. It required the entryman, in addition to complying with the homestead laws, to reclaim at least one-half of the total irrigable area of his entry for agricultural purposes. This section was supplemented in 1914 by the adoption of section 440. Section 440, which was quoted earlier, requires cultivation of one-fourth the irrigable area of the entry within 3 full irrigation seasons and cultivation of one-half the irrigable area within 5 full irrigation seasons. This latter provision is broader than section 439 in that it specifically requires cultivation in addition to reclamation.

The regulations exhaustively define the terms "reclamation" and "cultivation":

To comply with the provisions of the reclamation law as to reclamation and cultivation, the land must be cleared of brush, trees, and other encumbrances, provided with sufficient laterals for its effective irrigation, graded and otherwise put in proper condition for irrigation and crop growth, planted, watered, and cultivated, and during at least 2 years next preceding the date of approval by the official in charge of the project of proof of reclamation, except as prevented by hailstorm or flooding, satisfactory crops must be grown on at least one-half of the irrigable area thereof. A satisfactory crop during any year shall be any one of the following: (a) A crop of annuals producing a yield of at least one-half of the average yield on similar land under similar

conditions on the project for the year in which it is grown; (b) a substantial stand of alfalfa, clover, or of other perennial grass substantially equal in value to alfalfa or clover; or (c) a season's growth of orchard trees or vines of which 75 percent shall be in a thrifty condition. The crop production requirements of this section affecting lands embraced in reclamation homestead entries made after January 1, 1949, must be performed and met by the entryman personally, by members of his immediate family residing with him, or by persons employed under his direction, supervision, and management. 132/

Assuming the reclamation and cultivation requirements have been met, under section 541 final proof is not complete and no patent will be issued until all sums due the United States on account of the entry are paid. 133/ This provision of the law has not been interpreted to require full payment of the total reclamation charges assessed against the land before patent may issue, but only to require that those payments currently due be paid. 134/ The effect of the outstanding charges on the patentee's rights is discussed further in the following pages.

5. Assignments

Section 441 authorizes the assignment of reclamation homestead entries once regular homestead proof has been made, even if this is prior to the completion of reclamation proof. The section provides that all assignments shall be subject to the limitations, charges, terms and conditions of reclamation law. One of these restrictions is created by section 443, which provides that no person may hold by assignment more than one farm unit prior to final payment of the total charges for all other lands held by him subject to reclamation law. This section disqualifies as assignees all reclamation homestead entrymen or others who are receiving Federal water until their lands are no longer burdened with reclamation project construction charges.

If the assignee is a married woman, the regulations require that she must purchase the assignment with her own separate money in which her husband has no interest or claim. 135/

132/ 43 C.F.R. §2211.7-6(g) (1968).

133/ 43 U.S.C. §541 (1964).

134/ 43 C.F.R. §2211.7-6(a)(3) (1968).

135/ 43 C.F.R. §2211.7-4(a)(3)(iii) (1968).

This is to insure that a husband who holds an entry subject to construction charges will not place title in his wife to avoid the legal restrictions.

6. Patents, Liens for Construction Charges and the Effect of Full Payment

The subject of construction charges, their ascertainment and repayment, is long, complicated, detailed and beyond the scope of this chapter. However, certain aspects of the construction charge should be outlined. Section 461 discusses the purpose behind the construction charges as follows:

The construction charges which shall be made per acre upon the entries and upon lands in private ownership which may be irrigated by the waters of any irrigation project shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably. 136/

Pursuant to this provision, at the time the farm units are established a construction charge is determined based upon the classification of the land and the number of irrigable acres in the entry. 137/

As was noted earlier when discussing the applications for entry, section 471 requires the entryman to pay 5 percent of the construction charge fixed for his land at the time he applies for entry. After this first payment, the balance of the construction charge is due in annual installments, the first of which becomes due and payable on December 1st of the fifth calendar year after the initial installment has been paid. 138/ The Secretary can fix the number of years over which the annual payments can be spread, up to a maximum of forty years. 139/

Quite often the water is delivered to entries through legally organized water-users' associations or irrigation districts. In such an instance, the irrigation district becomes the fiscal agent of the United States and collects

136/ 43 U.S.C. §461 (1964).

137/ 43 U.S.C. §462 (1964).

138/ 43 U.S.C. §471 (1964).

139/ 43 U.S.C. §485(b) (1964).

the annual payments due. 140/

As noted above, the payment of all construction charges is not a prerequisite to obtaining a patent. The entrymen need only pay all charges currently due in order to be eligible for a patent. However, unlike the patentee under the desert land laws or the other homestead laws, the reclamation homesteader is not completely free of all restrictions once he receives his patent. On the contrary, there are several important statutory restrictions placed upon him.

First, section 542 provides:

Every patent . . . shall expressly reserve to the United States a prior lien on the land patented . . . , together with all water rights appurtenant or belonging thereto, superior to all other liens, claims or demands whatsoever for the payment of all sums due or to become due to the United States or its successors in control of the irrigation project in connection with such lands and water rights.

Upon default of payment of any amount so due title to the land shall pass to the United States free of all encumbrance, subject to the right of the defaulting debtor or any mortgagee, lien holder, judgment debtor, or subsequent purchaser to redeem the land . . . 141/

Second, section 544 as it applies to public land entries (it also applies to private land) provides that no one shall acquire, own, or hold irrigable land for which entry was made under the reclamation laws in excess of one farm unit before the final payment has been made of all construction charges. It also provides that no water shall be furnished or a water right sold or recognized under the reclamation laws for such excess land. This section does make an exception for excess land acquired by foreclosure or other process of law but requires that any such excess land be disposed of within five years after its acquisition.

Third, section 443, as mentioned above, provides:

No person shall hold by assignment more than one farm unit prior to final payment of all charges for all the land

140/ 43 U.S.C. §477 (1964).

141/ 43 U.S.C. §542 (1964).

held by him subject to the reclamation law, except operation and maintenance charges not then due. 142/

(a) The Effect of Full Payment of All Construction Charges.

While the above statutes make it quite clear that a reclamation homestead patent carries certain restrictions until all construction charges have been paid, there is some question whether there are any perpetual restrictions which continue after final payment of those charges.

Section 543 provides:

Upon full and final payment . . . the United States . . . shall issue upon request a certificate certifying that payment of the building and betterment charges in full has been made and that the lien upon the land has been so far satisfied and is no longer of any force or effect except the lien for annual charges for operation and maintenance. 143/

Sections 443 and 544 referred to above, when read alone, seem to imply that once full payment had been made the patentee may acquire additional lands and obtain reclamation water for use thereon without being subject to the excess land provisions of the reclamation law. However, there is considerable controversy concerning the effect of full payment on the right to receive reclamation water for lands in excess of 160 acres. This controversy involves the right of all landowners within a reclamation homestead or otherwise. As yet this controversy has not been resolved by the courts, but numerous opinions, briefs, and reports have been written on the subject of the effect of full payment of construction charges on the excess land provisions of Federal reclamation law. Mostly, these publications attempt to interpret the intent of Congress. They analyze the congressional records and discuss the interpretations made by others of the various statutes and congressional debates. There has not been unanimity in the conclusions reached.

To illustrate the controversy, without attempting to distill the voluminous material that has been written, it might be well to refer to a few of the published opinions. In 1914, Mr. Will R. King, the then chief counsel of the United States Reclamation Service issued an opinion to the Secretary of the Interior interpreting section 3 of the Act of August 9, 1912, 144/

142/ 43 U.S.C. §443 (1964).

143/ 43 U.S.C. §543 (1964).

144/ Act of August 9, 1912, ch. 278, §3, 37 Stat. 266 (codified as amended at 43 U.S.C. §544 (1964)).

which has been codified as amended as section 544 referred to above. In his opinion Mr. King came to the conclusion that section 3

[W]ill accordingly permit the furnishing of water for land on which payment in full has been made of building and betterment charges even when more than 160 acres of such land is owned by one person, provided the annual charges for operation and maintenance are made and all other requirements are complied with. 145/

In 1947 the then Associate Solicitor of the Department of the Interior, Mr. Felix S. Cohen, issued an opinion concerning the effect of full payment of construction charges under a joint liability repayment contract. This type of contract is one between the Bureau of Reclamation and an irrigation district under which the district and the individual land owners therein are jointly liable to the Bureau.

That opinion stated:

In the light of the foregoing, it is my view that upon full payment of construction obligation under a joint-liability repayment contract, the lands receiving water under such contract are, under the provisions contained in Section 3 of the Act of August 9, 1912, relieved of the statutory excess-land restrictions. 146/

In 1957 Mr. Elmer F. Bennett, who was then the Solicitor, issued an opinion on the authority of the Secretary of the Interior to enter into a contract with a water district which provided that individual holders of excess lands within the district could pay the construction costs allocable to their lands and thereby be relieved of the excess land provisions. 147/ He concluded that the Secretary had no such authority because the project involved was being operated pursuant to the provisions of section 46 of the Omnibus Adjustment Act of 1926. 148/ In his opinion he distinguished section 46,

145/ 43 L.D. 339 (1915).

146/ Solicitor's Opinion M-35004 (October 27, 1947).

147/ Solicitor's Opinion M-36457, 64 I.D. 273 (1957).

148/ Act of May 25, 1926, ch. 383, §46, 44 Stat. 649; (codified as amended at 43 U.S.C. §423e (1964)).

which requires a joint liability contract from earlier provisions of Federal reclamation law, i.e., section 3 of the Act of August 9, 1912 (section 544), which authorized individual contracts. He construed section 544 to mean that a reclamation homestead entryman would be free of all excess land limitations upon final payment of construction charges.

Then in 1961 Mr. Frank J. Barry, who was then the Solicitor, issued an opinion which is critical of the earlier ones issued by Messrs. King and Cohen. In his opinion Mr. Barry stated:

However, legislation enacted subsequent to the issuance of the King opinion renders it irrelevant to the issue presented as to the effect of payment upon Section 46. The Cohen opinion is in error as it not only ignored the subsequent legislation but relied on a misreading of King for support. 149/

Mr. Barry held that contracts when pending before the Secretary of the Interior which provided that the excess land provisions would not apply to land within the contracting district if the construction charges allocable to the district lands were paid off within 180 days were invalid and could not be entered into by the Secretary. 150/ While Mr. Barry was critical of the opinions of Messrs. King and Cohen, he did not contradict Mr. Bennett's opinion. He distinguished between an individual owning excess land in a district at the time the district enters into a contract for water and someone, such as a reclamation homesteader, who acquires excess land subsequent to the time he begins receiving water. He stated:

I have concluded that the land limitation requirements of Section 46 relative to disposition of pre-existing excess holdings cannot be avoided or their application frustrated by early payment of a contractor's repayment obligation and that payout is a relevant factor only in connection with the effect of excess land limitations on the coalescence of holdings. 151/

149/ Solicitor's Opinion M-36634 68 I.D. 372, 376 (1961).

150/ In a letter to the Secretary of the Interior dated December 29, 1961, the Attorney General agreed with Mr. Barry's conclusion. 68 I.D. 370 (1961).

151/ Solicitor's Opinion M-36634 68 I.D. 372, 376, 377 (1961).

...

Payout is not relevant to the recordable contract requirement of Section 46 of the 1926 Act. Section 3 of the 1912 Act [now codified as Section 544] as well as Sections 5 and 3 of 1902 Act remain viable under the joint liability contract system, but they, and payout, are relevant to application of excess land questions not covered by the recordable contract requirements, i.e., the subsequent acquisition of lands, - situations which for convenience I have described by the general reference "coalescence of holdings". 152/

Perhaps the only conclusion that can be drawn from the above is that the question of whether a reclamation homestead patentee is relieved of all Federal restrictions after he has made his final construction payments is not from doubt. It probably will not be free from doubt until the question is either decided by the courts or there is further congressional action. Until it is resolved in one of these two ways the reclamation homestead patentee will not know for certain whether his land is subject to perpetual restrictions against excess lands or whether once he makes the final construction payment he will hold his land free of all restrictions.

7. Desert Land Entries

Section 432 provides that once public lands which it is proposed to irrigate by means of any contemplated works have been identified, entry may only be made under the provisions of the homestead laws. However, since reclamation projects most often occur in semiarid regions of the states wherein the desert land laws apply, preexisting desert land law entries are often included within the boundaries of the area to be served by the project.

In such case section 448 provides relief to the desert land entryman who is directly or indirectly hindered, delayed or prevented by reason of the land withdrawal or construction of the reclamation project from making the required improvements or from reclaiming his land. The time during which the entryman is so delayed is not computed in determining the time within which the entryman is required to make annual expenditures and submit final proof.

The section also provides that if and when water is made available from the reclamation project, the desert land entryman may receive water from the project if he makes his entry subject to the provisions of reclamation law. An affirmative

152/ Id. at 404-5.

decision would require the desert land entryman to relinquish all land in excess of one farm unit and reclaim one-half the irrigable portion of the remaining land.

Section 448 specifically states that nothing therein shall be held to require a desert land entryman who owns a water right and reclaims his land independently of the reclamation project to accept the conditions of reclamation law.

8. Flathead Irrigation District Project

One additional reclamation homestead program should be mentioned. The Flathead Irrigation Project was constructed within the Flathead Indian Reservation under the provisions of the Act of April 23, 1904, 153/ as amended by the Act of May 29, 1908, 154/ and the Act of May 10, 1926. 155/ The Flathead Project was not carried out under the general provisions of reclamation law, but was constructed and operated under its own special act which was never codified. In most respects the requirements for entry and patent are identical to those of general reclamation law. However, in several respects, two of which will be discussed, the provisions differ.

First, in addition to the usual final proof requirements, an entryman within the Flathead Project must pay the appraised Indian price for the land. One-third the value of the land must be paid when entry is made with the balance paid over a 5-year period without interest. 156/

Second, although section 432 provides that the commutation provisions of the homestead laws do not apply to reclamation homestead entries, the Flathead Project Act permits commutation upon payment of the appraised Indian price. 157/ Commutation, of course, only fulfills the homestead final proof requirements and does not effect reclamation proof.

153/ 33 Stat. 302.

154/ Ch. 216, §15, 35 Stat. 438.

155/ 44 Stat. 464.

156/ 43 C.F.R. §2211.8-2(a) (1968).

157/ 43 C.F.R. §2211.8-7(a) (1968).

CHAPTER 3
THE DESERT LAND ACT

A. Introduction

As noted when discussing enlarged homesteads, the public land remaining in the nation after the more desirable lands were settled was arid or semiarid and required greater acreage for a profitable farm operation. The first attempt to change the public land laws to encourage the use and development of this dry land occurred in 1877 when Congress passed the Desert Land Act. ^{1/}

The objective of the desert land laws is somewhat different from the homestead legislation passed in 1862. The purpose of the desert land laws is to facilitate the reclamation of desert lands by private entrymen, ^{2/} not to grant free land to settlers who reside upon and cultivate the land. The act requires no residence by the entryman, but does require the payment of \$1.25 per acre as the price of the land. The philosophy and purpose of the desert land laws is well stated in the regulations as follows:

(a) It is the purpose of the statutes governing desert-land entries to encourage and promote the reclamation, by irrigation, of the arid and semiarid public lands of the Western States through individual effort and private capital, it being assumed that settlement and occupation will naturally follow when the lands have thus been rendered more productive and habitable.

(b) Such reclamation is often a difficult and expensive undertaking, and desert-land entrymen sometimes find serious difficulty in complying with all the requirements of the law, particularly persons who possess little capital. All claimants should restrict their entries to only that quantity of land which they can reasonably expect to reclaim, even though such area be much less than may be lawfully entered. As the more accessible and easily appropriated streams become exhausted, it becomes necessary to convey water, often for very long distances, from more remote

^{1/} Act of March 3, 1877, ch. 107, 19 Stat. 377 (codified as amended at 43 U.S.C. sec. 321 et seq. (1964)).

^{2/} United States v. Hanson, 167 F. 881 (9th Cir., 1909); Williams v. United States, 138 U.S. 514 (1891).

sources of supply, more elaborate and expensive systems of irrigation are required, the cost of water rights correspondingly increased, and individuals consequently find it necessary to unite their efforts in various forms of cooperative enterprise in order to secure the necessary capital. Nevertheless, a small tract of land, thoroughly reclaimed, with an adequate water supply obtained from a large, well-constructed irrigation system, may be considered a very valuable piece of property, and more desirable than a larger tract only partially reclaimed or reclaimed from a small, private irrigation system less permanent and efficient in character. ^{3/}

The desert land laws originally permitted the sale of 640 acres to one person. However, the aggregate quantity of land which a person can acquire under all the public land laws was limited by the Act of August 30, 1890 ^{4/} to 320 acres except in the case of mineral lands. Therefore, today 320 acres is the maximum entry under the desert land laws for an individual. As will be discussed more fully later in this chapter and in a separate chapter on acreage limitations, a husband and wife can obtain 640 acres of desert land as each of them may make a 320-acre entry.

The desert land laws are codified in sections 321-339 of Title 43 of the United States Code, 1964 Edition. Currently, these are the most active of the laws permitting disposal of agricultural land. In 1967, 123 final entries were approved totaling 30,732 acres. Almost 90 percent of this activity occurred in the two states of Idaho and Nevada. ^{5/}

B. Lands Subject to Entry

The lands subject to entry under the desert land laws are defined by section 322 ^{6/} as follows:

All lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be

^{3/} 43 C.F.R. sec. 2226.0-1 (1968).

^{4/} Ch. 837, sec. 1, 26 Stat. 391 (codified as amended at 43 U.S.C. sec. 212 (1964)).

^{5/} Bureau of Land Management, Department of the Interior, Public Land Statistics: 1967, Table 15, at 43.

^{6/} All section citations in this chapter refer to Title 43, United States Code, 1964 Edition, unless otherwise noted.

deemed desert lands, within the meaning of sections 321-323, 325 and 327-329 of this title, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated.

The determination of what may be considered desert land shall be subject to the decision and regulation of the Secretary of the Interior or such officer as he may designate. 7/

Lands which meet the requirements of section 322 are subject to entry under the desert land laws only if they are located in California, Colorado, Oregon, Nevada, Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, or North and South Dakota. 8/

1. Determination of Desert Character

Section 322 requires that the land must not, without irrigation, be capable of producing some agricultural crop. This statutory provision has been interpreted strictly. If any agricultural crop will grow without irrigation, the land will not be classified as subject to entry as desert land. In the case of Lay v. Hunter 9/ the Secretary stated:

While irrigation improves the crops on these lands, it is not essential to their production; and if any agricultural crop will grow thereon, although of an inferior quality, it is not subject to entry as desert land. 10/

However, in the case of Houston v. Spaulding 11/ the Secretary held that the land in question was desert and subject to entry under the desert land laws even though the land could be successfully cultivated by summer fallowing. The term summer fallowing means that a crop is produced only each alternate season and is commonly associated with a method of

7/ 43 U.S.C. sec. 322 (1964).

8/ 43 U.S.C. sec. 323 (1964).

9/ 2 L.D. 17 (1883).

10/ Id. at 18 (quoting from Wood v. Meyer (unreported, July 3, 1882)).

11/ 42 L.D. 524 (1913).

crop production known as dry farming. The Secretary held that:

It is not believed that land which can be successfully cultivated only by means of the so-called dryfarming system, should be classed as of that character which excludes it from desert land entry.

If such lands be susceptible of irrigation, they may not be entered under . . . (the enlarged homestead laws), but it is believed, and it is hereby held, that they may be entered under the desert land laws. 12/

The general rule, as stated in the administrative decisions, is that lands that for a series of years will not produce reasonably remunerative crops without irrigation are desert within the meaning of the desert land law. Lands within notoriously arid regions do not necessarily lose their desert character merely because of unusual rainfall during a few successive seasons. 13/

Several cases discuss the existence of trees as evidence of non-desert character. In United States v. Haggin 14/ evidence showed that cottonwood and willow trees were growing on the land in question at the date of entry. Conflicting testimony placed the number of trees between 200 and 1,000. However, the evidence clearly showed that the trees were of no commercial value, and could be used only for firewood or fence posts. The Secretary cancelled the entry because of the trees growing upon it.

In the Haggin decision the Secretary quoted from an earlier case and from a circular of instructions which he had previously issued in 1888. The circular stated: "If the ordinary forest trees will grow upon the land, there is sufficient moisture in the soil to render the land non-desert in character." 15/ The case he cited was Riggan v. Riley 16/ in which he said:

(E)ven if it be shown that the land will not produce some some agricultural crop without irriga-

12/ Id. at 525-526.

13/ Pederson v. Parkinson, 37 L.D. 522 (1909).

14/ 12 L.D. 34 (1891).

15/ 6 L.D. 662, 665 (1888).

16/ 5 L.D. 595 (1887).

tion, yet, if the testimony shows that there are several acres of timber on the land, such land can not be entered under said act. 17/

This Haggin decision is extremely ambiguous and it is impossible to tell whether the Secretary cancelled the entry because he considered it to be timberland or because the existence of trees evidenced the fact that the land was non-desert in character. In either case the reasoning of the Secretary is not convincing since neither the Riggin case nor the circular answered the question of the effect of noncommercial trees bordering a slough on the character of desert lands.

In spite of the ambiguity in the Haggin decision, the rule today seems to be the same as it was in 1891, namely that if there are trees upon the land an entry will not be allowed even if the trees are commercially worthless and even though the successful production of crops requires irrigation.

2. The Effects of Minerals on the Availability of Desert Lands

Section 322 requires that desert land entries be non-mineral. However, this requirement has been modified by 30 U.S.C., Sec. 121 (1964) which was discussed in Chapter 1 dealing with the general homestead laws. 18/ The rule with regard to desert land entries is identical to that governing general and enlarged homesteads. Lands that have been withdrawn or classified as valuable for phosphate, nitrate, potash, oil, gas, or asphaltic minerals may be entered under the desert land laws subject to a reservation to the United States of these minerals. 19/

3. The Effect of Partial Reclamation Upon the Availability of Lands for Entry

The regulations state that land that has been effectually reclaimed is not subject to desert land entry. 20/ For example, land reclaimed by a former entryman to the extent that it produced 200 tons of hay in one year is not subject to desert entry after it has been relinquished. 21/

17/ Id. at 596.

18/ See Chapter 1, pp. 8-11.

19/ 43 C.F.R. sec. 2226.0-7(a)(1) (1968).

20/ 43 C.F.R. sec. 2226.0-7(a)(3) (1968).

21/ Fisher v. Ballinger, 36 App. D.C. 511 (Ct. App. 1911); 40 L.D. 294 (1911).

This rule is strictly applied, and in some cases can result in extreme hardship. In the case of David E. Iveson 22/ an individual went upon public lands and reclaimed them prior to making entry under the desert land laws. Therefore, at the time of his application, the land had been reclaimed by his own efforts. The Secretary rejected his application stating:

It is unfortunate that appellant went forward with the reclamation and cultivation work on the lot before filing his desert land application and awaiting approval under that application. However, if his action amounted to an unauthorized trespass, which appears to be so from the case file before us, no rights to the land resulted because of it. . . . This case is governed by a decision rendered by this Department, George W. Wilkinson, A-29315 (May 2, 1963), which held that land which has been reclaimed, even though by the applicant himself, before filing his application to enter under the Desert Land Act, is no longer subject to entry as desert land. 23/

What will constitute reclamation is a factual question. However, in the case of Nilson v. Anderson 24/ the Secretary held that the mere fact that a tract of arid land is traversed by an irrigation canal is not sufficient to constitute reclamation and thereby take it out of the class of land subject to desert entry.

4. Compactness

The statutes and regulations permit the desert land applicant to propose entry of one or more tracts of public land. 25/ However, it is the long established rule of the Department of the Interior that a quarter quarter section (40 acres) or the fractional lot is the minimum unit of land for disposal. 26/ Therefore each tract of land chosen for entry must be a minimum of 40 acres or comprise a fractional lot, and, of course, the total of all tracts entered cannot exceed 320 acres. Prior to 1958 an entryman could enter only one tract which had to be an undivided unit not exceeding 320 acres. In that year

22/ A-30058 (Interior Dec., March 12, 1964).

23/ Id. at 1.

24/ 23 L.D. 138 (1896).

25/ 43 U.S.C. sec. 321 (1964); 43 C.F.R. sec. 2226.0-7(c)(1) (1968).

26/ Rubert Ray Spencer, 60 L.D. 198 (1948).

the law was changed. Today all the tracts entered need not be contiguous, but they must be sufficiently close to each other to enable satisfactory management as an economic unit. 27/

Whether or not all the tracts are contiguous, the regulations require that the entry be in as compact a form as possible taking into consideration the character of available public lands and the effect of allowance of the entry on the remaining public lands in the area. 28/

In determining whether an entry is compact, the authorized officer will take into consideration such factors as the topography of the land applied for and adjoining lands, the availability of public lands near the lands sought, the private lands farmed by the applicant, the farming systems and practices common to the locality, and the practicability of farming the lands as an economically feasible operating unit. 29/

A determination of compactness is a factual question, and several administrative cases have discussed and applied the philosophy behind the compactness rule. In the case of Frederick A. Bacon 30/ the Secretary stated:

As to shape, the entry must be compact; this to prevent the earlier comers from selecting the most eligible lands to the disadvantage of those who might follow - as by entering a narrow strip along a stream, thereby excluding others from access thereto. 31/

In the case of Abram M. Reid, 32/ the entryman appealed from a decision of the local land office requiring him to relinquish a portion of his entry to comply with the compactness requirements. The entry included five tracts of 40 acres each lying alongside each other making the tract 1 1/4 miles in length, with a uniform width of 1/4 mile. The Secretary reversed the lower decision stating:

As has been frequently said by this Department, no inflexible rule can be laid down as to what does constitute

compactness, but each case must be considered in the light of facts presented. In this case, . . . the entryman has apparently secured no benefit by taking the land in its present form, and the government has suffered no disadvantage thereby. In fact, it would seem that adjoining irrigable tracts left unappropriated are in a much more desirable shape for future purchasers than they would (otherwise) have been . . . 33/

C. Qualifications of Entrymen and Assignees

Section 321 sets forth the general requirements for an entryman under the desert land laws. The regulations restate these requirements as follows:

Any citizen of the United States 21 years of age, or any person of that age who has declared his intention of becoming a citizen of the United States, . . . can make a desert-land entry. 34/

These requirements are more general than those of the homestead laws and have been interpreted to permit persons to make desert land entries who cannot qualify for homestead entries. For example, married women are permitted to make desert land entries.

1. The Status of Married Women as Compared to the Homestead Laws

Section 2226.0-6 of the regulations states:

(A) woman whether married or single, who possesses the necessary qualifications, can make a desert-land entry, and, if married, without taking into consideration any entries her husband may have made. 35/

This regulation is in direct contradiction to the rules under the homestead laws that generally exclude married women from making entry. An early administrative decision discussed the distinction between the desert land laws and

27/ 43 U.S.C. sec. 321 (1964).

28/ Id.

29/ 43 C.F.R. sec. 2226.0-7(c)(2) (1968).

30/ 9 L.D. 248 (1889).

31/ Id. at 248.

32/ 24 L.D. 306 (1897).

33/ Id. at 308; for a similar situation see William H. Wheeler, 22 L.D. 412 (1896).

34/ 43 C.F.R. sec. 2226.0-6(a)(1) (1968).

35/ Id.

the earlier public land laws in the following manner:

On its face the (desert land) statute confers . . . (the entry) right generally on "citizens of the United States." It does not prefer one description of citizens and reject another. . . . Had it been the intention of Congress to restrict this right to a certain class of citizens, such intention would readily have found expression in other and appropriate words. As in the pre-emption law which confers the right of entry on certain conditions, on any person "being the head of a family, or widow, or single person over the age of twenty-one years, and a citizen of the United States, or having filed a declaration of intention to become such;" so in the homestead law which restricts the right to a "person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States or who has filed his declaration to become such." (sic) These laws are older than the act of June 3, 1878. The omission from the latter act of the words "head of a family," must be assumed to have been made with a purpose, and the obvious purpose is that Congress did not propose to restrict the right as in the former acts. 36/

Thus, the Secretary decided that married women may make entry under the desert land laws. However, his interpretation emphasizes the questionable reasoning of the rulings which deny married women the right to make homestead entries. In the decision quoted above, the Secretary indicated that it was the omission of the words "head of a family" which must be assumed to have been done purposely by Congress. However, he overlooks the fact that in the homestead laws the words "head of a family" are located in a disjunctive clause which applies only when the entryman is under twenty-one years of age. 37/ Therefore, the omission of the term "head of a family" in the desert land laws does not aid the argument that a married woman over twenty-one years of age may make entry under the desert land laws but not under the homestead laws.

2. Corporate Disqualification Under the Desert Land Act

The language of section 321, by requiring that an entryman be a citizen or intended citizen, appears to limit entry to natural persons. The cases have accepted this interpretation, and have disqualified corporations from making entry.

36/ Delila Stukel, 10 L.D. 47, 48 (1890)

37/ 43 U.S.C. sec. 161 (1964).

This view is supported by section 324 which forbids assignments of entries to or for the benefit of corporations.

In the case of Salina Stock Co. v. United States, 38/ an entry of desert land was made in the name of persons living a great distance from the land at the expense of an association which was subsequently incorporated. After the ditches were dug, the entrymen were taken, solely at the corporation's expense, to view the land for the purpose of enabling them to make final proof. After title was perfected the entrymen conveyed it to the corporation. The court held that this was a fraudulent entry to benefit a corporation, and the patent was cancelled.

3. Residence Requirements

Section 325 requires that an entryman be a resident citizen of the state or territory in which the land sought to be entered is located. The section exempts the State of Nevada from this requirement. The term "resident citizen" has been interpreted to mean domicile. Therefore, the applicant must reside in the state with an intention to make it his future home. Mere future intention to establish domicile is not sufficient. Actual domicile must have commenced prior to application. 39/

The resident citizenship qualification is sufficiently met by a desert land entryman if, at the time of entry, he has established his residence in the state and his acts indicate a bona fide intent to make it his future home even though he thereafter temporarily maintains a residence elsewhere. In the case of Lacy v. Woodbury 40/ the Secretary stated:

It is a well settled principle of law that no specified time is required in fixing a domicile and the shortest period of residence, if only for a day, will be sufficient when coupled with the evidence of intent. 41/

The necessity of domicile is not a continuing requirement, coextensive with the life of the entry, but merely one which must exist at the time entry is made. 42/

38/ 85 F. 339 (8th Cir. 1898).

39/ Bessie R. McDonald (On Rehearing), 51 L.D. 401 (1926).

40/ 49 L.D. 114 (1922).

41/ Id. at 116 (citation omitted).

42/ Lacy v. Woodbury, 49 L.D. 114 (1922).

4. The Effects of Ownership of Other Land

The desert land laws do not contain any specific limitations on the ownership of other land in order to qualify to make desert entry. Therefore, a desert land entryman is not limited by a provision similar to section 161, which governs entry under the homestead laws. The entryman may own more than 160 acres of other land and still make a desert land entry. In fact, he can own thousands of acres, if the land was acquired from private sources.

However, the entryman is subject to the provisions of section 212 which provide that no one can acquire more than 320 acres of agriculture land from the United States, and of section 329 which provides that no one may "hold" more than 320 acres of desert lands. ^{43/} Section 212 refers to all of the public land laws concerning agricultural use. Therefore, no more than 320 acres of public land can be acquired by any one person under a combination of the homestead laws, enlarged homestead laws and desert land laws, with one exception. This exception appears in section 330 which was added to the desert land laws in 1917:

The right to make a desert-land entry shall not be denied to any applicant therefor who has already made an enlarged homestead entry of three hundred and twenty acres: Provided, That said applicant is a duly qualified entryman and the whole area to be acquired as an enlarged homestead entry and under the provisions of this section does not exceed four hundred and eighty acres. ^{44/}

5. The Effects of Previous Entries or Applications

Section 321 states that "no person may make more than one entry" under the desert land laws. The regulations expand on this requirement by stating:

A person's right of entry under the desert-land law is exhausted either by filing an allowable application and withdrawing it prior to its allowance or by making an entry or by

taking an assignment of an entry, in whole or in part ^{45/}

This regulation resulted from a common practice of applying for entry and then relinquishing the application prior to its approval for a substantial consideration. The consideration would be paid by a third party who would, after the relinquishment, make entry on his own behalf. In order to eliminate the situation where one person would make numerous applications for entries, find buyers, and then for a fee withdraw the applications prior to approval, the Department of the Interior held that the right of entry was exhausted by withdrawing an allowable application prior to its allowance.

However, a withdrawal of an application after it has been rejected for cause does not exhaust the applicant's right to apply a second time. ^{46/}

While a person's right to make desert entry is generally exhausted upon making such an entry, section 182, which applies to desert land entries as well as homestead entries, permits second entries if the applicant can:

(S)how to the satisfaction of the Secretary of the Interior that the prior entry or entries were made in good faith, were lost, forfeited, or abandoned because of matters beyond his control, and that he has not speculated in his right nor committed a fraud or attempted fraud in connection with prior entry or entries. ^{47/}

Under this statute, the principles discussed in Chapter 1, on pages 15-17 are also applicable to the desert land laws. It should be noted that section 182 requires that the entryman show he has not speculated in his original entry. Therefore, one who made entry merely for the purpose of relinquishing it for a price would not be qualified to make a second entry under section 182.

The regulations provide that an assignee of a desert land entry is considered an entryman and may not, therefore, make a future entry on his own behalf. ^{48/}

^{43/} For a discussion of what constitutes a holding under section 329, see p. 161, *infra*. Also, it should be noted that lands acquired under the mineral land laws, by exchanges, through public sales or by operation of law are excluded from the 320 acre limitation provided by Section 212.

^{44/} 43 U.S.C. sec. 330 (1964).

^{45/} 43 C.F.R. sec. 2226.0-6(b) (1968).

^{46/} Jack Edward Kahlow, A-26173 (Interior Dec., May 2, 1951).

^{47/} 43 U.S.C. sec. 182 (1964).

^{48/} 43 C.F.R. sec. 2226.0-6(b) (1968); 43 C.F.R. sec. 2226.1-2(b) (1968).

6. Assignee's Qualifications

Section 324 states that no assignment shall be made except to an individual who is qualified to make entry on his own behalf. The section also states that assignments may not be made to any corporation or association. Consequently, no person may take a desert land entry by assignment unless he is twenty-one years of age and, excepting in Nevada, a resident citizen of the state wherein the land is located. 49/

Since assignment is equivalent to the making of an entry, a person may not accept an assignment if he has previously made an entry or received another assignment of a desert land entry. However, a person who has the right to make a second entry pursuant to the provisions of section 182 may exercise that right by taking an assignment. 50/

D. Applications for Entry

1. Procedural Steps and Information Which Must be Supplied

Section 321 states that a desert land entry may be made by anyone who files a declaration under oath that he intends to reclaim the tract of desert land. 51/ The declaration under oath is in the form of a six-page application for entry. 52/ Under this application the prospective entryman must certify among other things that:

1. He is twenty-one years of age or older.
2. He is a citizen of the United States or an alien who has filed a declaration of intention to become a citizen.
3. The lands are essentially nonmineral.
4. The application is made without intention of obtaining title to lands known or classified as valuable for minerals or timber or obtaining title to land that can be feasibly used for agricultural purposes without being irrigated.
5. The lands are unoccupied.
6. The lands are not reclaimed.

49/ 43 C.F.R. sec. 2226.1-2(b)(1) (1968).

50/ 43 C.F.R. sec. 2226.1-2(b)(2) (1968).

51/ For a detailed discussion of the intent requirement, see pp. 157-58 infra.

52/ A copy of this application is set forth in Appendix B, p. B-17 et seq.

The application also requires the prospective entryman to supply information as to his plan of irrigation, to state the status of his attempts to obtain water rights, to investigate and state the soil characteristics of the entry, and to give figures which will demonstrate the economic feasibility of the proposed farming enterprise. 53/ The application form warns applicants that the land applied for cannot be entered unless it is classified under section 7 of the Taylor Grazing Act. 54/ The petition for classification is a separate document which must be filed concurrently with the application for entry. 55/ The certifications must be made upon the personal knowledge of the entryman and must be made from a personal inspection of the land. 56/

An essential act in making entry is the payment of the first installment of 25¢ an acre towards the ultimate purchase price, which is \$1.25 an acre. When an application is unaccompanied by such payment the application initiates no right to the land and the land manager is under no duty to notify the applicant that the application is defective. 57/

a. Amendment of Applications

There is no statutory provision in the desert land laws similar to those found in the homestead and enlarged homestead laws which would permit the desert land entryman to make an additional entry. In spite of the lack of statutory authority, the Department of the Interior has enacted regulations which permit land to be added to the original entry by amending the application. This amendment procedure fulfills the same need as does the additional entry sections of the homestead laws.

Section 2226.1-6 of the regulations permits an amendment of a desert land entry under two circumstances: first, where contiguous land susceptible of irrigation or worthy of the expense of irrigating was under appropriation at the time of the original entry, but is later released from such appropriation; and second, where subsequent investigation shows that by changing the irrigation plan, additional contiguous

53/ For a further discussion of the economic feasibility requirement, see p. 164, infra.

54/ 43 U.S.C. sec. 315(f) (1964).

55/ A copy of the petition is set forth in Appendix B, p. B-2.

56/ Lewis Wolfley, 12 L.D. 90 (1891).

57/ Charles Schoenburg, Wilma I. Claverie, A-27434 (Interior Dec., June 3, 1957).

land which the entryman reasonably believed could not be reclaimed with his available water supply can be so reclaimed. 58/

These regulations are much broader than section 697 of the code and section 1821.6-5 of the regulations. 59/ Section 697 permits an amendment of an entry only when an innocent mistake has been made in describing the entry. Section 1821.6-5 of the regulations is intended to allow an amendment of an entry in any case where it is satisfactorily shown that, through no fault or neglect of the entryman, the land embraced in his entry is so far unfit for, or insusceptible of, occupancy, cultivation, or irrigation, as to render it practically impossible to perform the requirements of the law thereon. The two bases for amendment referred to above apply in the absence of mistake and even when the original entry is economically sufficient.

Early administrative decisions held that the Secretary of the Interior could not amend a desert land entry to include adjoining land which, at the time of entry, had been subject to a homestead entry, but which became available due to cancellation of the homestead entry. 60/ However this view soon changed and by 1904 the Secretary was allowing amended entries based on the following rationale:

(While her) petition technically cannot be treated as an application to amend her said entry, yet inasmuch as the law gives the desert land applicant the right to enter 320 acres of land and its policy is to encourage the reclamation and improvement of lands which are desert in character, and there being no ad-

58/ 43 C.F.R. sec. 2226.1-6(a) (1968). "(1) In any case where it is satisfactorily disclosed that entry was not made to embrace the full area which might lawfully have been included therein because of existing appropriations of all contiguous lands then appearing to be susceptible of irrigation through and by means of entryman's water supply, or of all such lands which seemed to be worthy of the expenditure requisite for that purpose, said lands having since been released from such appropriations. (2) Where contiguous tracts have been omitted from entry because of entryman's belief, after a reasonably careful investigation, that they could not be reclaimed by means of the water supply available for use in that behalf, it having been subsequently discovered that reclamation thereof can be effectively accomplished by means of a changed plan or method of conserving or distributing such water supply."

59/ 43 C.F.R. sec. 1821.6-5 (1968).

60/ E. J. Meecham, 5 L.D. 414 (1887).

verse claim to the land applied for, no reason is seen why, under the wise and liberal administration of the law, the said applicant should not be allowed to enlarge her original entry so as to include therein the land applied for. 61/

In the case of Sarah Nanna, 62/ the Secretary stated that the right to enlarge a desert entry is governed by the same general principles as govern the enlargement of homestead entries. In this case a desert land entry was made for less than the maximum area because the contiguous land was nonirrigable from any known source of water supply. However, the land later became susceptible of irrigation and an amendment to the original desert land entry was allowed. The Secretary made the statement that the right to enlarge is governed by the same general principles as govern homestead entries in spite of the fact that there is no statutory basis for either amending desert land entries or allowing additional entries thereto.

An entry may be amended by substituting a tract not included therein for one of the subdivisions covered in the entry where after diligent effort it is found impossible to effect reclamation of that subdivision. 63/

The regulations do not allow amendment of the application under all circumstances. In the case of James W. Elliott 64/ an application to amend a desert land entry was denied where the Secretary found no substantial equitable basis for granting the amendment. In this case the additional land was available at the time of the initial entry and the entryman was unable to show that he reasonably felt it to be nonirrigable at that time.

In the case of Leonard C. Olson 65/ a desert entryman was not allowed to amend his entry where he desired the additional land in order to construct a dwelling thereon and not for reclamation purposes.

61/ Ella Pollard, 33 L.D. 110, 111 (1904).

62/ 40 L.D. 512 (1912).

63/ Harriet A. Babcock, 21 L.D. 265 (1895).

64/ A-29075 (Interior Dec., July 18, 1963).

65/ A-29962 (Interior Dec., March 3, 1964).

2. Water Rights and Irrigation Systems

The key portions of the application for desert land entry are those dealing with water rights, irrigation systems and the economic feasibility of irrigating the proposed entry. Detailed regulations and numerous administrative and court decisions have established minimum standards for water rights and irrigation systems.

The regulations elaborate on the evidence of water rights required as follows:

(d) Evidence of water rights required with application. No desert-land application will be allowed unless accompanied by evidence satisfactorily showing either that the intending entryman has already acquired by appropriation, purchase, or contract a right to the permanent use of sufficient water to irrigate and reclaim all of the irrigable portion of the land sought, or that he has initiated and prosecuted, as far as then possible, appropriate steps looking to the acquisition of such a right, or, in States where no permit or right to appropriate water is granted until the land embraced within the application is classified as suitable for desert-land entry or the entry is allowed a showing that the applicant is otherwise qualified under State law to secure such permit or right. If applicant intends to procure water from an irrigation district, corporation, or association, but is unable to obtain a contract for the water in advance of the allowance of his entry, then he must furnish, in lieu of the contract, some written assurance from the responsible officials of such district, corporation, or association that, if his entry be allowed, applicant will be able to obtain from that source the necessary water. The manager will examine the evidence submitted in such applications and either reject defective applications or require additional evidence. 66/

The water right required must be sufficient to reclaim all irrigable portions of the land sought. 67/ This requirement should be compared with that of the general homestead laws for entries in arid or semiarid lands. In the discussion in Chapter 1, pp. 31-37, it was noted that the

Department of the Interior now requires evidence of a water right for homestead entries in arid regions. However, the water right required in such circumstances is only that necessary to cultivate one-eighth of the entry, the amount of cultivation required for final proof. Under the desert land laws, the water right required is that necessary to irrigate the entire entry.

Historically, as demonstrated by the numerous cases which approved applications based on all types of water rights, the source of water was irrelevant as long as the amount was sufficient to irrigate all irrigable portions of the entry. However, recent decisions by the Department of the Interior have changed the situation, and today only water obtained under an appropriative system of water rights is acceptable for purposes of approving an entry application.

In 1955 the Solicitor of the Department of the Interior issued opinion M-36263 68/ concerning the validity of desert land applications and entries in Arizona dependent upon percolating groundwater for reclamation. At issue was the interpretation of the phrase found in section 321 "That the right to the use of water . . . shall depend upon bona fide prior appropriation. . . ." It can be argued that the word "appropriation" as used in that phrase is synonymous with "acquisition". However, the Solicitor's opinion held, based upon the case of California-Oregon Power Co. v. Beaver Portland Cement Co. 69/ that the term "appropriation" is a word of art referring to the water law rules of appropriation and was specifically used by Congress in contrast with the common law doctrine of riparian rights or any other alternate system of water rights.

Based on this opinion, the Department of the Interior announced that no desert land entries based upon percolating groundwater may be made in states, such as Arizona, where such groundwater is not subject to prior appropriation but only to the doctrines of reasonable or correlative use. Although the Solicitor's opinion discusses only percolating groundwater, by analogy the decision would preclude reliance upon riparian rights for purposes of a desert land law application. Since most of the western states do not recognize the common law rule of riparian rights, and since little, if any, riparian land subject to desert land entry remains, such an extension does not create serious problems. However, by eliminating percolating groundwater as a proper source of water for reclaiming a desert land entry, the Secretary has severely limited the application of the desert land laws in

66/ 43 C.F.R. sec. 2226.1-1 (1968).

67/ United States ex rel. Faull v. Ickes, 82 F. 2d 879 (D.C. Cir. 1936).

68/ Solicitor's Opinion, M-36263 (February 23, 1955).

69/ 295 U.S. 142 (1935).

several western states, including Arizona; Montana; Colorado, in some circumstances; and California, if the entry does not overlie the groundwater basin. 70/

Even in the states where percolating groundwater is subject to prior appropriation, the Secretary has indicated his intention to carefully scrutinize all entries based on percolating groundwater to encourage water conservation and to insure that the Federal Government does not contribute to the unnecessary depletion of underground water reserves. Under this announced policy, 71/ the Secretary may exercise his discretion and not allow a desert land entry if the current requirements for the irrigation of lands already under cultivation equal or exceed the annual rate of recharge in the underground water basin upon which the entryman plans to rely.

Assuming the water right shown by the applicant is of an appropriative nature, the applicant must demonstrate that the right covers a sufficient quantity of water to irrigate the proposed entry. With regard to subsurface water supplies the case of Ross C. Osborn 72/ states that a desert land application for lands that are to be irrigated from wells located upon the lands sought must be accompanied by plausible presumptive evidence of a satisfactory water supply based upon information available from the local state engineer's office or other available technical information or advice concerning the occurrence of groundwater upon or near the land. The applicant must also supply information as to the location, depth, static water level, draw-down level, and volume of flow of other wells heretofore sunk and affording a water supply to adjoining or nearby lands, or a statement that there is no such information available.

If there is no presumptive evidence of a satisfactory water supply, the Secretary requires that investigations be

70/ Compilation of a complete list of states affected by the percolating groundwater decision would require a thorough examination of each state's groundwater law. Such a study has not apparently been conducted by the Department of the Interior; however, for a partial listing of affected states, see Appendix D pp. D-15 to D-29, where Department of the Interior Memorandum, M-36378 (January 19, 1956), discussing four states, and the case of Ruby E. Huffman, 64 I.D. 57 (1957), which modifies the rule with regard to California, are reproduced.

71/ Bureau of Land Mgt. Manual, Vol. V, Part 2, ch. 2.22 Appendix 2 (November 1, 1961).

72/ Nev. 045321 (B.L.M. Dec., August 1, 1958).

carried out before the entry will be allowed. Towards this end, the Department of the Interior has, in the past, and, on occasion, still will issue a special use permit to a desert land applicant which allows him to drill exploratory wells in an attempt to prove that water is available. This permit suspends the application for a period of six months while the applicant endeavors to prove that sufficient water exists. If, at the end of six months, existence of a water supply has not been shown, the application is denied. 73/

In several decisions the Secretary has held that it is not necessary for the applicant to show with absolute certainty the existence of an adequate water right. In the case of Myrl Y. Farnsworth 74/ the Secretary stated:

Although the evidence as to the availability of necessary water at an economical depth for pumping is not conclusive, the appellant has submitted some evidence that water may be available. If Mrs. Farnsworth is willing to risk constructing the facilities required to reclaim the land in accordance with the Desert Land Act, conclusive evidence regarding the supply of irrigation water is not essential for the allowance of her application. 75/

In the case of Ezra M. Carter, Harry Fogliatti 76/ the Secretary stated:

At the time of the filing of desert-land applications, conclusive evidence of a . . . (water) supply is not required, but only plausible presumptive evidence of the supply's activity, adequacy, and constancy. . . . The effect of the decision of the Assistant Director is, . . . to require an applicant to show at the time of application not merely plausible presumptive evidence of a satisfactory water supply but also conclusive evidence that no eventuality will make the supply unavailable and reclamation impossible.

73/ Rockwell A. Davis, Pedro O. Garcia, A-28071, A-28081 (Interior Dec., October 29, 1959); Jack B. Aldridge, Ina D. Aldridge, A-27520, A-27559 (Interior Dec., March 12, 1958).

74/ A-26680 (Interior Dec., April 30, 1953).

75/ Id. at 1.

76/ A-26165, A-26191 (Interior Dec., October 5, 1951).

The law and the regulations make no such impossible requirement. Moreover, any such requirement would be foreign to the philosophy of the desert-land statutes and the regulations implementing them. In affording to individuals an opportunity to obtain patent to valuable lands by reclaiming them, the Congress is inviting the adventurous to a precarious enterprise. The regulations warn the applicant that the reclamation effort is full of risks, but beyond putting the applicant on guard they do not protect him. They leave it to him to calculate the risks and take or reject them, as he chooses. The regulations are liberal toward the applicant is allowing him to enter the land if there is plausible presumptive evidence that he will have an adequate and constant water supply for its reclamation. But the rules are not tender towards him at the time of final proof if before then some unforeseen eventuality shall have occurred to make reclamation seem impossible.

77/

If the applicant does not demonstrate that he has available a sufficient amount of water to irrigate the entire property applied for, it is proper to approve a portion of the application to the extent of the water right shown. In other words, if an applicant shows that he has available sufficient water to irrigate part of his entry, the application may be allowed as to the legal subdivisions that the applicant has sufficient water to irrigate and rejected as to the remaining lands applied for. 78/

In the case of Mattie A. Zobrist 79/ the Department rejected an application for desert-land entry on the ground that the water conservation district on which the applicant relied on a source of water did not appear to be organized and operated in a manner which would reasonably guarantee a continuing, adequate source of water. The decision held that while the disapproval of the district remained in force, the applicant would not be allowed to enter on the basis of water to be delivered by the district. However, the entry would be allowed if she could show an alternative, satisfactory source of water.

77/ Id. at 3-4 (footnotes omitted).

78/ Ewing T. Skinner, A-30468 (Interior Dec., April 5, 1966).

79/ 56 I.D. 4 (1936).

In some instances the entryman's water right is obtained by transferring water from private land already in production to the public land. In such a situation it is departmental policy to allow the entry only if the public land will be substantially more productive if irrigated than the land from which the water is to be transferred. 80/

Assuming that a sufficient water right has been demonstrated, the application for entry must also describe the nature of irrigation works which will be used to reclaim the land. In the case of Peggy Faye Billingslea 81/ the Director of the Bureau of Land Management stated the requirement as follows:

The regulations provide that at the time of filing a desert land application, the applicant must submit a map of the proposed development and a summary statement of facts demonstrating not only that an adequate water supply is available for the irrigation of the land but also that the land is suitable for irrigated crop production. The plan of the proposed irrigation system must be completed and documented in sufficient detail to reasonably demonstrate that the land is susceptible of development by some practical means In this case the brief statements of the type of irrigation system to be used and the rough sketches of the proposed irrigation systems which have been submitted by the applicants fall short of satisfying these requirements. 82/

In the case of Clifford D. Wilson 83/ the requirement was discussed in the following terms:

The map shows nothing more than a proposal to construct a ditch or pipeline parallel with Highway No. 111 and the Southern Pacific Railroad extending for approximately 3 3/4 miles from Niland Lateral 5 to the proposed entry. He has stated that he is doing all that is possible to obtain easements for a right of way. The applicable regulation specifically requires a general statement of the proposed works, an estimate of the cost and

80/ Lawrence R. Sill, Idaho 06679 (B.L.M. Dec., February 19, 1959).

81/ Nevada 051934 (February 6, 1961).

82/ Id. at 1 (citations omitted).

83/ A-29287 (Interior Dec., April 12, 1963).

such other data as will enable the Department to determine the sufficiency of the water supply and the feasibility of the proposed works to convey water to the lands to be irrigated. . . . Appellant's showing falls far short of that required by the regulation. 84/

In the case of Newell A. Bastian 85/ the land applied for bordered a creek which was dry during the summer. The applicant demonstrated that he had the right to appropriate water from the creek, but had not shown that he would be able to utilize the winter flood flows in such a manner as would allow the development and reclamation of the property. For this reason the application was rejected.

Not only must the applicant describe the irrigation system which he plans to develop, he must also show that it is economically feasible to utilize this type of development. In the case of Gordon R. Minnix 86/ the land was found to be suitable for desert entry and the applicant had furnished plans for an irrigation system. The applicant was told that he must estimate costs and supply other data as would enable the Department of the Interior to determine the feasibility of the proposed irrigation works to convey an adequate supply of water to the land. The decision stated:

In this case, the water supply appears to be adequate at the source. The questions with respect to feasibility relate to the length and cost of the canal proposed to be constructed for carrying the water from the Snake River to the land, the extent of seepage losses in the proposed canal, and the height of the pumping lift from the river to the proposed canal. 87/

E. Final Proof Requirements

The requirements to obtain patent under the desert land laws are established by section 328 and 329. Section 328 provides:

No land shall be patented to any person under sections 321-323, 325 and 327-329 of this title unless he or his assignors shall have

84/ Id. at 2 (citation omitted).

85/ A-30526 (Interior Dec., June 7, 1966).

86/ A-25868 (Interior Dec., May 18, 1950).

87/ Id. at 1.

expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least \$3 per acre of whole tract reclaimed and patented in the manner following: Within one year after making entry for such tract of desert land as aforesaid the party so entering shall expend not less than \$1 per acre for the purposes aforesaid; and he shall in like manner expend the sum of \$1 per acre during the second and also during the third year thereafter, until the full sum of \$3 per acre is so expended. Said party shall file during each year with the officer designated by the Secretary of the Interior proof, by the affidavits of two or more credible witnesses, that the full sum of \$1 per acre has been expended in such necessary improvements during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and extent of such improvements. If any party who has made such application shall fail during any year to file the testimony aforesaid the lands shall revert to the United States, and the 25 cents advanced payment shall be forfeited to the United States, and the entry shall be canceled. Nothing herein contained shall prevent a claimant from making his final entry and receiving his patent at an earlier date than hereinbefore prescribed, provided that he then makes the required proof of reclamation to the aggregate extent of \$3 per acre: Provided, that proof be further required of the cultivation of one-eighth of the land. 88/

Section 329 provides that in addition to making satisfactory proof of compliance with the requirements of section 328 and the other provisions of the desert land law, the entryman must prove he is a citizen of the United States and pay the remaining one dollar per acre toward the statutory purchase price of \$1.25 per acre. This payment is not to be confused with the three annual expenditures of one dollar per acre required by section 328.

1. Expenditure of at Least \$1.00 per Acre per Year for the First Three Years

The regulations state the purpose of the annual proof

88/ 43 U.S.C. sec. 328 (1964). A copy of the "Desert Land Entry Final Proof" form is set forth in Appendix B, p. B-26.

requirement is:

. . .to test the sincerity and good faith of claimants under the desert-land laws and to prevent the segregation for a number of years of public lands in the interest of persons who have no intention to reclaim them. . . 89/

The annual proof requirement is mandatory and the law makes no provision for an extension of time in which to file such proof. The proof must be submitted by the anniversary date of the entry. 90/

This rule has been strictly applied by the Department even in the face of unavoidable circumstances which make accomplishment of any improvements impossible. In the case of Durward E. Fry 91/ the entryman claimed he could not work on the land due to mountain fever. The Secretary held that the provisions of section 328 were mandatory and that neither the Director of the Bureau of Land Management nor the Department of the Interior has any supervisory or discretionary jurisdiction to qualify the provisions of the statute.

This strict rule appears to apply only when, in fact, improvements valuing \$1.00 per acre were not constructed. In the case of John A. Brown 92/ an entry was cancelled for failure to file annual proof. The entryman had expended approximately \$25,000 on the entry and had clearly spent the statutory minimum of \$1.00 per acre. However, he alleged that due to the press of other business, the absence of his witnesses from the state, and an emergency on other holdings, he was unable to submit the annual proof within the time required. He further alleged he did not know that strict compliance with the statute was required. The Secretary allowed the entry to be reinstated, stating that it was in accordance with the principles of equitable adjudication particularly in this case when there were no intervening rights.

Section 328 requires that annual expenditures be made for the necessary irrigation, reclamation, and cultivation works,

89/ 43 C.F.R. §2226.1-4 (1968). A copy of the "Desert Land Entry Annual Proof" form is set forth in Appendix B, p. B-25.

90/ Lysander C. Pond, Los Angeles 099829 (October 15, 1958).

91/ 45 L.D. 172 (1916).

92/ New Mexico 011712 (June 20, 1958).

for permanent improvements upon the land, and for the purchase of water rights for the irrigation of the same. Pursuant to this provision the following expenditures have been determined to qualify under the annual expenditure rule:

1. The cost of fencing. 93/
2. The purchase of shares of stock in an irrigation company entitling the entryman to a certain amount of water. 94/
3. Payment to cover the entryman's proportionate share of the cost of constructing and maintaining a joint irrigation system by means of which his land is proposed to be irrigated. 95/

The regulations add to the list of acceptable expenditures the following items:

(b) Acceptable expenditures. (1)
Expenditures for the construction and maintenance of storage reservoirs, dams, canals, ditches, and laterals to be used by claimant for irrigating his land; for roads where they are necessary; for erecting stables, corrals, etc.; for digging wells, where the water therefrom is to be used for irrigating the land; for stock or interest in an approved irrigation company, or for taxes paid to an approved irrigation district through which water is to be secured to irrigate the land; and for leveling and bordering land proposed to be irrigated, will be accepted. Expenditures for fencing all or a portion of the claim, for surveying for the purpose of ascertaining the levels for canals, ditches, etc., and for the first breaking or clearing of the soil are also acceptable. 96/

The following expenditures have been held to be unacceptable for the purposes of annual proof:

1. Expenditures for machinery for boring wells for irrigation. Such machinery is not considered a permanent improvement but merely the means for making permanent improvements. 97/

93/ Mullin v. Keaster, 44 L.D. 161 (1915).

94/ Caldwell v. Halvorson, 36 L.D. 395 (1908).

95/ Munson v. Johnson, 39 L.D. 127 (1910).

96/ 43 C.F.R. §2226.1-4 (1968).

97/ Nelson J. Littlejohn, 36 L.D. 638 (1907).

2. Well casing purchased, but not yet attached to the realty. 98/

3. The expenditure required for erection of a dwelling house. This expenditure is not allowed since section 328 contemplates expenditures for permanent improvements necessary to the irrigation, reclamation and cultivation of the land. 99/

It is the reasonable value of the work or improvements that is the criterion under section 328, and not the amount alleged to have been expended therefor. 100/

In the case of Mullin v. Keaster 101/ the entryman, his brother, and his mother made entries totaling 800 acres. The three entries were enclosed by one fence. The entryman claimed the construction of this fence as his annual expenditure for the first year. The Secretary rejected this expenditure for that portion of the fencing which was not constructed upon his land, quoting section 328 requiring permanent improvements upon the land. This term was interpreted to mean the land of the entryman only. The case does not, however, stand for the proposition that all expenditures for purposes of annual proof must be made on the entryman's land. The nature of fencing is such that it is only of value to the entry if it is constructed on the entry. However, with regard to improvements such as irrigation works, the expenditures would qualify even if the work were not done on the entry. 102/

2. Perfection of a Water Right Sufficient to Irrigate all Cultivable Land on the Entry

The regulations concerning the water right required at final proof 103/ are a short treatise describing and discussing both the legal right to appropriate water and the actual ability to obtain such water.

Where the entryman bases his water right upon a contract or purchase he must establish the legal sufficiency of the right. If he has previously done so with regard to his application, he must show that he still holds the same rights. 104/

98/ Wilkinson v. Stillwell, 35 L.D. 92 (1906).

99/ Instructions of February 27, 1906, 34 L.D. 465.

100/ Bradley v. Vasold, 36 L.D. 106 (1907).

101/ 44 L.D. 161 (1915).

102/ For a discussion of who must make the required annual expenditures, see p.158-60, infra.

103/ 43 C.F.R. §2226.1-5(h) (1968).

104/ 43 C.F.R. §2226.1-5(h)(1) (1968).

In the Instructions of November 16, 1906, 105/ the Department recognized that the procedure of some states creates a situation which renders it impossible for the entryman to obtain a firm water right within the time limit for filing final proof under the desert land laws. In such a situation the entryman is required to show only that he has done all that is required of him by the laws of the state, together with proof of actual irrigation of one-eighth of the land embraced in the entry. 106/

In most states an appropriative water right cannot be perfected unless the appropriator proceeds with reasonable diligence to apply the water to beneficial use. Final proof, therefore, must show that the claimant has exercised such diligence as will result in the ultimate perfection of a sufficient water right. 107/

The water must also be brought to such a point on the land as to readily demonstrate that the entire irrigable area of the entry may be irrigated from the system. 108/

The regulations are very specific that an actual as well as a legal water right is required. They warn that desert land claimants should bear in mind that a water right and a water supply are not the same and are not always necessarily found together. The requirements for final proof are not met by a person who hold an apparent water right for land which he has not irrigated, and which, moreover, he can never irrigate because of the lack of available water to satisfy his apparent right. Therefore, with reference to that portion of the irrigable land which has not been irrigated prior to final proof, a water right will not be accepted if its use appears to be impossible because there is no actual supply of water available under the appropriation. 109/

If the entryman plans to obtain water from an irrigation or water company, upon final proof he must show that the resources and reliability, including particularly the source and volume of the water supply of the company or district in question, are such as to reasonably guarantee the continued delivery of water to the land. The Bureau of Land Management will not accept final proof based upon water from a water or irrigation company until an investigation of the company has been made and a report thereon approved. The information required by the report will be regarded as determining, at

105/ 35 L.D. 305 (1906).

106/ 43 C.F.R. §2226.1-5(h)(3) (1968).

107/ Id.

108/ Id.

109/ 43 C.F.R. §2226.1-5(h)(4) (1968).

least tentatively, the amount of stock or interest which the entryman must hold in the water company to insure himself a sufficient supply of water to reclaim the land. 110/

3. Reclamation

In addition to demonstrating ownership of a sufficient water right, the entryman must show that he has constructed works which will allow the water to be placed on all the irrigable land of the entry. In other words, he must prove that reclamation of the entry has occurred. To establish the fact of reclamation, the evidence must show not only that water has been brought upon the land, but also that proper means have been supplied for the distribution of the water to each legal subdivision entered. 111/ The proof must supply information as to the number and length of all ditches on each legal subdivision. 112/

What constitutes sufficient reclamation will vary from case to case and is a factual question. In the case of *Elodymae Zwang* 113/ the Bureau of Land Management sought to cancel an entry on the ground that ten gallons of water per minute per acre were required for successful cultivation in a typical cropping program. According to the Bureau's decision, the entryman's pump produced only 1,284 gallons per minute or enough to irrigate only about 172 acres. 114/ The Bureau, therefore, cancelled the entry as to all acreage in excess of that which could be successfully cultivated with 1,284 gallons per minute. The entryman appealed, and the case was reversed and remanded, the Secretary stating:

It is true that the Bureau decisions were based upon the Zwangs' own pump test made on February 13, 1963, which showed a water production rate of 1,284 gpm. However, whether this capacity is sufficient to irrigate all the irrigable land in the entire depends on a number of other factors: The type or types of crops to be grown and the water duty of such crops, the nature of the soil, its porosity, etc., the frequency of irrigation, and other such factors. The Bureau's conclusion that 1,284 gpm is not sufficient to irrigate all the irrigable land

in the entries is based upon assumptions as to these factors which the Zwangs have sharply challenged. The only proper way of resolving the factual disputes is to hold a hearing at which expert testimony and other evidence can be submitted and subjected to cross-examination and rebuttal. 115/

The Secretary has held that if less than one-eighth of a legal subdivision of land included within an entry is susceptible of irrigation from the claimant's source of water supply and no portion of that subdivision is needed in order to irrigate the remainder of the entry the subdivision must be relinquished. 116/ However, as pointed out in the case of *Eudora v. Anderson* 117/ where a legal subdivision included within an entry is shown to be a necessary part of the plan to irrigate the adjoining tracts, such use is sufficient to bring inclusion of such subdivision within the meaning and intention of the desert land law, and it need not be irrigated in order for the entryman to retain it.

In *Vibrans v. Langtree* 118/ the entryman did not irrigate his land by means of ditches and laterals but by flooding. The Secretary held that this was sufficient reclamation. In his decision he stated:

The substance of [the] decisions and instructions is, that the proof should show, that water sufficient for purposes of irrigation and permanent reclamation has been brought to the land and properly distributed, . . . but, as said in the above quotation from the departmental decision, the desert land act "does not prescribe a particular mode of irrigation," and all that is required by the said decisions and instructions, fairly construed, is, that the mode of irrigation shall be such as "evinces the good faith of the claimant" and renders the land suitable for agriculture. The mode of irrigation is wisely left to be determined by the circumstances of each case. It does not appear in this case, that irrigation by ditches was practicable, or, if so, that it would

110/ 43 C.F.R. §2226.1-5(i) (1) (1968).

111/ *Atwater v. Gage*, 15 L.D. 130 (1892).

112/ *W. R. Williams*, 9 L.D. 137 (1889).

113/ A-30201 (Interior Dec., February 3, 1965); *aff'd*, 371 F.2d 634 (9th Cir. 1967).

114/ The mathematics here are difficult to follow, but the rule of law still applies.

115/ A-30201 (Interior Dec., February 3, 1965) at 3.

116/ 43 C.F.R. §2226.1-5(f) (1968); *Eudora v. Anderson*, 43 L.D. 269 (1914).

117/ 43 L.D. 269 (1914).

118/ 9 L.D. 419 (1889).

answer the purpose of reclamation better than the mode adopted. The periodic flooding by means of the dam seems to have carried water upon the land in sufficient quantity, and to have distributed it in a manner to enable the claimant to raise crops, and in this connection with his payment of \$1,000.00 for an interest in the dam sufficiently evinces his good faith. 119/

4. Cultivation

The last proviso of section 328 requires that the entryman show that he has cultivated one-eighth of the land. The applicable law and the regulations specifically contemplate that the lands will be cultivated and reclaimed for agricultural purposes in a manner calculated to produce profitable results, and not merely for grazing. 120/

In discussing cultivation under the homestead law, the question of whether orchards constituted a proper form of agricultural activity was raised. 121/ In the case of Samuel D. Block 122/ the production of deciduous fruits was specifically approved for desert entries using the following language:

Where it is shown, as in this case, that deciduous fruits are the only kind of crop that may be produced, cultivation of such trees is sufficient to meet the requirements of the law, for such crops may be considered as ordinary agricultural crops. 123/

The term cultivation is used to connote the same type of activity as is required under the homestead laws. In the case of Brandon v. Costley 124/ the requirement was stated as follows:

There is nothing from which it can be inferred that the word "cultivation" was employed in the act in any different sense from what is

ordinarily understood by that term, namely, tillage, which, as defined by Webster, is "the operation, practice, or act of tilling or preparing land for seed, and keeping the ground in a state favorable for the growth of crops." 125/

Successful cultivation is not necessary, but the entryman must show that he has made a bona fide effort to produce an agricultural crop. Adequacy of good faith is measured by the extent of efforts to produce a productive and profitable crop. Providing good faith can be shown by other means, the destruction of a crop by pests or other unforeseen circumstances will not invalidate the cultivation. 126/

The type and pattern of cultivation will vary from entry to entry and region to region. In the case of United States v. Alberta Hill Swallow 127/ the Secretary approved a two season cropping plan where the entrywoman adequately demonstrated that a reasonable farming operation would contemplate growing crops on different areas in two separate growing seasons. Such an approval, of course, would also affect the amount of water which the entryman must show upon making final proof.

The Department of the Interior has required that the cultivation carried out by a desert land entryman be irrigated cultivation. 128/ Of course, if adequate rainfall makes artificial irrigation unnecessary during the year when cultivation is carried out, then irrigation water need not be applied to the lands. However, if the cultivation was carried out early in the life of the entry before adequate irrigation works had been constructed and the cultivation was carried out only because sufficient rainfall happened to occur, the good faith of the entryman may be questioned. 129/

5. Extensions of Time to File Final Proof

Satisfactory compliance with the annual proof requirements does not necessarily mean that the land will have been reclaimed

119/ Id. at 421.

120/ United States v. Horace J. Knowlton, Idaho 09725 (October 10, 1967); aff'd, A-30912 (Interior Dec., May 21, 1968).

121/ See Chapter 1, p. 31.

122/ 45 L.D. 481 (1916).

123/ Id. at 484.

124/ 34 L.D. 488 (1906).

125/ Id. at 498.

126/ Charles Edmund Bemis, 48 L.D. 605 (1922).

127/ 74 I.D. 1 (1967).

128/ Charles Edmund Bemis, 48 L.D. 605 (1922); Nancy M. Hough, 47 L.D. 621 (1921).

129/ United States v. Elsie Marie Knowlton and Horace J. Knowlton, A-30912 (Interior Dec., May 21, 1968).

or cultivated. Therefore, section 329 requires that the entryman complete all work of reclamation and cultivation and file final proof within four years after entry. However, over the years a number of statutes have been enacted to grant extensions of time. The first was passed in 1909, 130/ the second in 1912, 131/ and the third 1925. 132/ These extension provisions are cumulative and allow the entryman a maximum of 9 additional years in which to file final proof.

The first of the extension provisions, now codified as section 333, permits a three-year extension if the entryman can satisfactorily show that although he has complied with the law in good faith, he is unable to make proof of reclamation and cultivation because of an unavoidable delay, through no fault on his part, in the construction of the necessary irrigation works. The second extension provision, section 334, grants a further extension of time of up to three years for basically the same reasons as set forth in section 333 and based upon the same good faith efforts of the entryman to complete the necessary reclamation. The third extension provision is section 336. It also grants a three-year extension for basically the same reasons and requires the same showing.

The regulations expand on the statutory requirements, and specifically state that the period of extension granted under any one of the three provisions will not automatically be three years. Its length is left to the Secretary's discretion, depending on the type of work remaining to be done, but in no event more than three years. Further, the regulations emphasize the point that before any extension will be granted the entryman must show an unavoidable delay in the construction of irrigation works for which he was not responsible and which he could not have readily foreseen. 133/

The extension of time provisions have nothing to do with the requirement that annual proof of the expenditure of at least one dollar per acre per year for the first three years be submitted. As noted when discussing annual proof, there is no statutory basis for granting an extension of time to file such proof.

130/ Act of March 28, 1908, ch. 112, §3, 35 Stat. 52 (codified as amended at 43 U.S.C. §333 (1964)).

131/ Act of April 30, 1912, ch. 101, 37 Stat. 106 (codified at 43 U.S.C. §334 (1964)).

132/ Act of Feb. 25, 1925, ch. 329, 43 Stat. 984, (codified at 43 U.S.C. §336 (1964)). A fourth statute was passed in 1915. However, this enactment, which is codified as section 335, applies only to entries made prior to March 4, 1915, and is no longer of practical interest.

133/ 43 C.F.R. §2226.2-3 (1968).

An entryman who has complied with the law as to annual expenditures and desires to make an application for an extension of time to make final proof should file with the manager of the land office a statement setting forth facts showing how and why he has been prevented from making final proof. This statement must be corroborated by two witnesses who have knowledge of the facts. 134/

The regulations reiterate that applications for further extension under sections 334 and 336 may be made in the same manner as extensions under section 333. 135/

Extensions of time are generally granted only if the entryman can show external physical misfortunes which have rendered the construction of a sufficient irrigation system impossible. In the case of Fred Steininger 136/ the three annual proofs had been submitted and the entryman had drilled a well more than 400 feet deep and costing more than \$1,400. But he had obtained insufficient water from the well to irrigate the entry. The Secretary held that the physical failure of the well was an unavoidable delay within the meaning of section 333 and an extension was granted to allow the entryman to carry on further exploration for adequate water.

An extension for a similar reason was granted in the case of Bertha Early Robison, 137/ where the entrywoman, in good faith, expected to obtain water by means of what the Secretary described as ordinary surface wells. (Presumably he was referring to some type of easily constructed shallow well.) It was later discovered that such wells would not furnish an adequate water supply and the drilling of deep artesian wells would be necessary. The Secretary stated:

The intended source of water failed, which is no less a disappointment or unforeseen circumstance than is the failure to complete project irrigation works and the obtaining of water by her own or cooperative efforts by the damming of a stream and construction of the irrigation system. 138/

134/ 43 C.F.R. §2226.2-4(b) (1968).

135/ 43 C.F.R. §2226.2-5 (1968).

136/ 43 L. D. 189 (1914).

137/ 43 L.D. 241 (1914).

138/ Id. at 242.

The cases of Phillips v. Gray 139/ and Hoobler v. Treffry 140/ both involved a situation in which the water company which was to supply irrigation water to the entries failed due to mismanagement by officers of the company. An extension of time was granted in both cases on the following rationale stated in the Hoobler case:

It satisfactorily appears that this entryman's assignee acted in good faith in undertaking to comply with the desert land law, expending a large amount of money in reliance upon a system of irrigation approved as and reputed to be adequate, and only failing because of reckless if not criminal mismanagement of the company by its principal officer. Until water was secured, cultivation of the land would be useless, and failure to cultivate under the circumstances shown is not evidence of bad faith nor such fault on the part of the assignee herein as should exempt him from the remedial operation of this act. The contention made that he did not make expenditures in good faith "for a valid water right" contains no force, as the failure to receive water under his purchase was not due to invalidity of his purchased right but to mismanagement of the company's affairs, rendering it unable to fulfill its contract to furnish water under such purchase. 141/

An extension was granted for a somewhat similar situation in the case of Sarah E. Sligh. 142/ The predecessor of the Director of the Bureau of Land Management had ordered that 240 acres of the entry be relinquished since the entrywoman held only enough stock in a mutual water company to irrigate 80 acres of her entry. The entrywoman argued that the water company was involved in water rights litigation with other water companies and that she should not be required to purchase more stock until the litigation was settled. The Secretary agreed and held that to require her to purchase more stock would be an unjust burden.

On the other hand, extensions of time will not be granted for the personal illness, misfortune or financial condition of

139/ 41 L.D. 603 (1913).

140/ 39 L.D. 557 (1911).

141/ Id. at 560.

142/ 43 L.D. 282 (1914).

the entryman. In the case of John F. Hawkins 143/ the entryman claimed that one of the reasons he was unable to reclaim and cultivate the entry was due to serious illness. The Secretary in rejecting his application stated:

Even if the illnesses indicated by the appellant had occurred during 1959 when active operations on the entry were required, they would not have been acceptable to excuse the entryman's inaction since there is no requirement that reclamation be accomplished through the personal efforts of the entryman. 144/

The case of Charles T. McCormack 145/ aptly demonstrates the firmness of the rule that an extension of time will not be granted where failure to construct irrigation works results largely from the inability to obtain financial assistance. The facts relied upon by the entryman are stated in the opinion as follows:

On May 12, 1966, the appellant filed the request for a one-year extension the rejection of which occasioned this appeal. He gave as reasons that at a time when he had 90% of the requirements met, his irrigation equipment valued at \$8,500.00 was stolen and that he did not have the financial resources to continue the work, but that financial assistance is now available to him. He also said that he had invested \$21,000 in the entry, that 50 acres were leveled, cleared and planted to Sudan grass, and that there are three wells on the entry, that power is available, and that all that is lacking is a qualified type of water distribution system. 146/

The Secretary rejected his application for an extension in one brief paragraph stating:

It is well established that an extension will not be granted when the justification for requesting one is that the entryman has been

143/ A-28664 (Interior Dec., August 1, 1961).

144/ Id. at 3.

145/ A-30717 (Interior Dec., June 30, 1967).

146/ Id. at 2.

unable to obtain the necessary financing. 147/

Taking the McCormack and Hawkins cases together, it is apparent that financial inability caused by a prolonged, severe illness of the entryman is not a proper basis for a time extension. The rationale would be that the entryman can borrow money while he is ill and hire someone else to do the work.

The failure of hired well drillers to complete performance of their work is also not a proper basis for a time extension if there is no showing that the work could not have been accomplished by others. In the case of Joseph S. Holt, Rose J. Holt 148/ the only reason given on the application for a time extension was that the person upon whom the entryman had relied to drill the well had suffered the loss of a hand in an accident. The facts of the case indicated that the entry had been made on April 22, 1955, and the accident had occurred on August 8, 1958, nearly three and one-half years after entry and only eight months prior to the final proof deadline. The Secretary in rejecting their application stated:

For the appellants to wait that long in reliance upon one individual to perfect their entries for them scarcely imports the kind of diligence with which an entryman is expected to prove up his entry. Beyond this, the appellants give absolutely no reason why the accident . . . tragic as it was, should prevent physically or financially the drilling of a well on their entries. 149/

The case of Paul I. Kochis 150/ presents similar facts and a similar result. The entryman's primary reason for needing an extension of time was his inability to get a well driller. He stated that he had contacted two different drillers who had promised to do the work, but who then kept "putting him off". The Secretary stated:

There have been numerous departmental decisions, in circumstances parallel to those obtaining here, ruling that a claimant's

147/ Id. at 4.

148/ A-28468 (Interior Dec., November 22, 1960).

149/ Id. at 3.

150/ A-30427 (Interior Dec., October 26, 1965).

failure to get a well drilled because he relied upon others or because his finances were inadequate, or because of other reasons where he should have been able to anticipate the delay or where he could have done more than he did, is insufficient to demonstrate a lack of fault upon the entryman and an unavoidable delay in the construction of the irrigation works. 151/

In the case of Edwin M. Dillhoefer 152/ the entryman based his request for an extension of time on the assertion that he did not yet know what type of crops could be most economically raised on the mesa for commercial purposes. In consequence thereof, he did not know what type of irrigation works to construct, since some crops require more water than others. The Secretary rejected his application for an extension stating:

It appears, both from the field report and from Mr. Dillhoefer's appeals, that there is not present here any condition which would make the construction of irrigation works more difficult or expensive than Mr. Dillhoefer might reasonably have anticipated when he took the assignment to the entry. All that appears to prevent them from being built is the fact that Mr. Dillhoefer cannot decide what type to build. His position in failing to construct the works is perfectly understandable, and, indeed, reasonable, but it is not an "unavoidable delay", and that is the only ground recognized in the statute as a basis for an extension of time within which final proof must be filed. 153/

The cases have held that a request for an extension of time is premature where the entry still has a substantial period of life remaining. 154/

151/ Id. at 3. For similar decisions see: John F. Hawkins, A-28664 (Interior Dec., August 1, 1961); LaDean Butler and Ellen R. Butler, A-28673 (Interior Dec., February 7, 1962); Trinidad Alba, A-29061 (Interior Dec., October 30, 1962); Eldon D. Childress, A-29763 (Interior Dec., December 24, 1963); Virgil H. Belisle, A-29954 (Interior Dec., March 24, 1964); John P. Overholser, Patty L. Overholser, A-29992 (Interior Dec., June 3, 1964).

152/ A-25909 (Interior Dec., November 8, 1950).

153/ Id. at 2.

154/ Heirs of Arthur A. Allen, A-30902 (Interior Dec., March 21, 1968).

The case of Maggie L. Havens ^{155/} has created an interesting fact situation with regard to the filing of final proof and extensions therefor. The Havens case concerned an entry in the Coachella Valley in California which was dependent upon Colorado River water for irrigation. The entrywoman in the Havens case requested that her entry be suspended until water could be made available from the All-American Canal which was to be constructed from the Colorado River. It was held in the Havens decision that:

[T]his entry and all other entries similarly situated should be suspended, and remain suspended until water for the irrigation of the lands covered by it and then becomes available, or until it shall be found advisable to revoke the suspension for any sufficient reason hereafter arising. ^{156/}

Construction of the All-American Canal was completed on March 4, 1952, and the suspensions ordered in the Havens case should have automatically terminated. However, the Bureau of Land Management did nothing until 1965 to reinstate the numerous entries which had been suspended. On December 2, 1965, the Secretary of the Interior issued a press release and sent letters to the various entrymen whose entries had been suspended notifying them that unless they submitted proof within ninety days that their entries had actually been reclaimed or were, on that date, in the process of diligently being reclaimed the entries would be cancelled for failure to comply with the terms of the 1923 suspension order and the desert land laws. ^{157/}

The catalyst which forced the Secretary to take some action with regard to the Coachella Valley entries, and also various entries in the Imperial Valley which had also been affected by the Havens suspension, was the decision of the United States Supreme Court in Arizona v. California, ^{158/} which held that California was entitled to a consumptive use of only 4,400,000 acre-feet per year of Colorado River water. According to the Secretary, California was already using about 700,000 acre-feet of Colorado River water over its basic allotment. Since the Coachella and Imperial Valley desert land entries depended upon Colorado River water for irrigation, the Secretary felt that sound water conservation

^{155/} A-5580 (Interior Dec., October 11, 1923).

^{156/} Id. at 8.

^{157/} Department of the Interior News Release, December 2, 1965, at 2.

^{158/} 373 U.S. 546 (1963).

plans required strong action to limit the use of Colorado River water for irrigation of lands within the Coachella and Imperial Valleys. The purpose of the Secretary's action on the Havens suspensions was to force the cancellation of numerous desert land entries which, if developed, would further overtax the Colorado River water supply.

Since the Secretary's news release of 1965 several cases have arisen in which entrymen in the Coachella and Imperial Valleys have requested extensions of time to reclaim their desert land entries. As a matter of policy the Secretary has denied these requests for extension, stating that discretionary grants of extensions of time will not be made where to do so would result in the agricultural reclamation of desert lands in California relying upon water from the Colorado River, since it is contrary to the public interest to increase the pressure on the inadequate water supply in the river presently available for use in California. ^{159/} The statutory basis for denying extensions of time for policy reasons such as these is unclear.

F. The Effect of Assignments and Other Forms of Transfer Prior to Final Proof

1. Assignments to Third Parties

Section 324 states that no assignments of desert land entries will be allowed or recognized, except to individuals who are themselves qualified to enter the assigned premises, "but no assignment to or for the benefit of any corporation or association shall be authorized or recognized." ^{160/}

Assignments which are permitted may include all or part of an entry. As noted previously in the discussion on the qualifications of entrymen and assignees, an assignee must meet all the qualifications for original entry of desert land.

The regulations state that desert land entries are initiated by the payment of the twenty-five cents per acre required by section 321. Therefore, no assignable right is acquired by the applicant prior to such payment. ^{161/} However, the regulations also state that an assignment which is made on the day of such payment or soon thereafter will be

^{159/} LaVerne Ficken Staton McCoy, A-30725 (Interior Dec., April 28, 1967); Heirs of Cora Wood Duncan, A-30893 (Interior Dec., March 27, 1968).

^{160/} 43 U.S.C. §324 (1964). For a discussion of what types of agreements constitute assignments, see pp.160-61, infra.

^{161/} 43 C.F.R. §2226.1-2(c) (1968).

treated as suggesting fraud and will be carefully scrutinized. 162/

In spite of the provision which declares that assignments to disqualified persons and associations shall not be authorized or recognized, an assignment to a qualified assignee from a mesne assignor who is not qualified is valid, if the mesne assignment has been approved, although erroneously, by the Bureau of Land Management. To hold otherwise would be a trap for the innocent assignee who has relied on the Bureau's approval of the previous assignment. 163/

As noted in the earlier section on the qualifications of assignors, an assignment is considered the same as an entry and the assignee is disqualified from making further entries or taking further assignments under the desert land laws. In spite of this disqualification, the case of Fannie D. Weideranders 164/ holds that the execution of an assignment of a desert land entry will not disqualify the entryman from taking a reassignment of the same land from his assignee. Such reassignment will be regarded as a rescission of the original agreement.

Also, where an entry has been divided and one-half assigned to each of two qualified assignees the Department of the Interior has held that it is competent for a qualified person to take an assignment of both halves of the divided entry either by joint assignment from the two holders or by separate assignment from the holder of each portion. 165/ On the surface, it would appear that this case permits two assignments in spite of the disqualification of further entry after accepting one assignment. However, the Secretary reasoned that the mere temporary separation of a single land entry into two land entries will not necessarily bar an individual from reuniting the two halves into a single whole.

The assignee stands in his assignor's place as effectively as though he had made the entry, and is subject to all requirements imposed on the assignor. 166/ Since the assignee stands in his assignor's place, the time for filing final proof is measured from the date of original entry.

162/ Id.

163/ Ruple v. De Journette (On Rehearing), 50 L.D. 139 (1923); Augusta Ernst, 42 L.D. 90 (1913).

164/ 42 L.D. 94 (1913).

165/ Id.

166/ 43 C.F.R. §2226.1-2(c) (3) (1968).

The regulations spell out the procedural requirements for assignments. 167/ The assignee is required to pay a ten dollar service fee and to submit a certified copy or the original of the deed of assignment, and a statement showing he is qualified to take the entry assigned to him. Assignments of desert land entries are not conclusive until examined in the land office and found satisfactory.

2. Mortgages

The regulations recognize the right of a desert land entryman to mortgage his interest in the entered land in order to raise funds with which to develop the property. However, a mortgage will be allowed and recognized only if under local law a mortgage is regarded as a lien on the property and not as a conveyance thereof. 168/ If the entryman for some reason fails to perfect his entry, the rights of the United States are superior to the lien against the land. The lien can be enforced only if and when the entryman obtains a patent to the land.

The mortgagee can protect himself if he can qualify as an assignee. A mortgage foreclosure prior to submittal of final proof may be regarded as an assignment and the mortgagee-assignee may be entitled to submit final proof. 169/

3. Executory Contracts to Convey

Section 2226.1-2(c) (2) 170/ of the regulations and several administrative decisions 171/ clearly state that the provisions of law authorizing assignment of desert land entries furnish no authority to make executory contracts to convey the land after issuance of a patent. If such a conveyance is attempted final proof will be rejected and the entry cancelled. In Eymann v. Wright, 172/ the California Supreme Court supported this administrative interpretation, quoting at length from the case of Herbert C. Oakley. 173/

167/ 43 C.F.R. §2226.1-2 (1968)

168/ 43 C.F.R. §2226.1-3(d) (1968).

169/ Thomas E. Jeremy (On Review), 25 L.D. 375 (1897); 43 C.F.R. §2226.1-3(d) (1968).

170/ 43 C.F.R. §2226.1-2(c) (2) (1968).

171/ Herbert C. Oakley, 34 L.D. 383 (1906); Lois L. Pollard, A-30226 (Interior Dec., May 4, 1965).

172/ 177 Cal. 144, 169 P. 1037 (1917).

173/ 34 L.D. 383 (1906).

"While absolute assignments of desert land entries are recognized as valid, it does not follow that the language of the act of March 3, 1891, allowing such assignment, recognizes the right of the claimant to execute an executory contract to convey the land after the issuance of patent and thereafter proceed with the submission of final proof in furtherance of his contract. The result of the recognition of such a right of the claimant is clearly manifest, and the effect thereof might easily operate to nullify that provision of the act which declares that no person or association of persons shall hold by assignment, or otherwise, prior to the issuance of patent, more than 320 acres of such arid or desert land.

"In the case of absolute assignment of such entries, the assignee assumes the position of an original entryman, so far as his qualifications to take are concerned; and he, being the person then charged with the submission of satisfactory proof of compliance with the law, is before the land department in his own right and all future transactions respecting the entry are conducted directly with him. The land department, in such case, has before it the actual party in interest and can deal with him personally. By the recognition of an executory contract to convey after patent, leaving only a nominal party in interest before the department who would be permitted to submit proof of his own qualifications and compliance with the law, with no requirement as to proof of the right of the real beneficiary to take the land, a far different end may be accomplished, directly contrary to the spirit and intent of the desert land law. By proceeding under such contract, any person or corporation might easily acquire a quantity of land greatly in excess of that allowed under the act. The department, while recognizing the validity of absolute assignments of desert land entries, is clearly of opinion that any extension of the privileges accorded by the plain terms of the act, especially in the manner contended for by claimant, is entirely unwarranted, and proof of the existence of such contract should prevent the acceptance of the final proof." 174/

In the Coburn v. Bartholomew, 175/ a case decided the same year as the California case just cited, the Utah Supreme Court came to the opposite result with regard to executory contracts to convey. This was an action between two private individuals to enforce a contract to convey a desert land entry. The defendant claimed that an executory contract to sell was illegal and that the plaintiff was not a qualified assignee. Therefore, the defendant argued, the contract could not be enforced. The Utah court rejected his claim, stating that the written agreement was not an assignment of the land in question. At most it was only an agreement on certain conditions to convey the land in the future. The court stated, "[W]e are unable to see wherein the agreement in question contravenes either the letter or the spirit of the law above quoted and relied on by appellant." 176/

The California case appears to be the better reasoned of the two and goes into more detail in discussing the policy considerations behind the rule against executory contracts to sell. The Department of the Interior has largely ignored early cases which upheld the right of private parties to enter into executory contracts. The rule today is that such contracts are illegal and as between the entryman and the Bureau of Land Management, will cause the entry to be cancelled. 177/

4. The Desert Entry As Personal Property

The decisions have held that an unperfected desert land entry is personal property. 178/ Being personal property, it is subject to the same rights and duties as any other personal property held by the entryman. For example, an unperfected entry is property which will pass through a trustee upon a voluntary or involuntary assignment in bankruptcy. 179/

175/ 50 Utah 566, 167 P. 1156 (1917).

176/ Id. at 570, 167 P. at 1157.

177/ For a further discussion of contracts to convey, see pp.160-61 infra.

178/ Lovina Shadick, 48 L.D. 26 (1921).

179/ Evans v. Neal, 46 L.D. 82 (1917); In re Evans, 235 F. 956 (D. Idaho 1916).

174/ 177 Cal. at 145-46, 169 P. at 1038.

However, upon the entryman's bankruptcy, an assignment cannot be made for the benefit of a creditor who is not a qualified assignee under the desert land laws, for an assignment to benefit creditors is considered the same as any other assignment under the desert land laws. 180/

Since the unperfected entry is personal property, the right to perfect the entry descends to the entryman's devisees and heirs under his will or by operation of local law. 181/

In the case of Lovina Shadick 182/ the director held that an administrator of a deceased entryman's estate could not relinquish a desert land entry without approval of the proper probate court, since the entry is to be treated the same as any other property passing under a will.

If the entry passes to the heirs of the entryman, the patent should issue in the names of the heirs. 183/

G. The Indian Hill Decision and Its Effect on Desert Land Law Administration

The large expense of providing irrigation facilities for reclamation of desert land entries has led to the practice of entrymen joining together to share the cost of an irrigation system to serve all their entries. This procedure is proper under section 327. However, the problems raised by group entries are manifold as the desert land law requires that no individual hold more than 320 acres of desert land, 184/ that the individual have a good faith intent to reclaim the entry for his own benefit, and that corporations not hold desert land entries by assignment or otherwise. Since the group entries are both an individual and group effort, the entrymen must be extremely careful to insure that the requisite degree of individual effort is retained.

180/ Stockmen's Nat. Bank of Ft. Benton v. Hofeldt, 54 Mont. 205, 169 P. 48 (1917).

181/ Phillips v. Carter, 135 Cal. 604, 67 P. 1031 (1902); Gasquet v. Butler's Heirs, 28 L.D. 343 (1899).

182/ 48 L.D. 26 (1921).

183/ Instructions, 13 L.D. 49 (1891).

184/ 43 U.S.C. §329 (1964).

A recent 50-page opinion 185/ and its administrative repercussions present a current and important example of the problems caused by group entries and also point up some problems met by individual entrymen under the present administration of the desert land laws. This case, generally referred to as the "Indian Hill Decision", involved the entry of a substantial tract of land adjoining the Snake River in Idaho by a group of individuals who hoped to jointly construct an extensive irrigation system which would allow each of them to perfect his desert land entry.

1. Facts

In 1960, one Raymond T. Michner and his partner, Wallace Reed, began promoting the development of desert land entries in the Indian Hill area. Reed and Michner interested an additional ten people. The twelve individuals filed the necessary data and made formal application to the local land office for a total of 3,688.6 acres.

The plan which Michner and Reed advanced to the applicants contemplated a formation of a mutual water company which would supply water to its stockholders, the entrymen. The entrymen and the water company would then apply to the United States Bureau of Reclamation for a Small Reclamation Project Act 186/ loan in the amount needed to construct the irrigation system. They estimated that the total cost of the project would be \$1,921,478.

A mutual water company named Indian Hill Irrigation Company was formed and began operations in 1961. However, it acted in a strictly informal capacity since, although the certificate of incorporation had been obtained from the State, the corporation never issued stock, held regular meetings of its board of directors or adopted by-laws.

By the fall of 1962 it became clear that the small reclamation project loan would not be forthcoming. Therefore, Reed and Michner began investigating other methods of financing the needed irrigation works. A national insurance company indicated that it would loan the entrymen some of the necessary development funds provided that: (1) It be given a first mortgage on certain lands in private ownership, (2) 1000 acres of the desert land entries be placed under irrigation, (3) The legal requirements for title on two of the entries be completed, and (4) All of the desert land entries

185/ United States v. Ollie Mae Shearman et al., Idaho Desert Land Entries - Indian Hill Group, 73 I.D. 386 (1966).

186/ 43 U.S.C. §422(a) et seq. (1964).

be leased to competent, well financed tenants who would do an acceptable job of farming.

Michner and Reed placed this proposal before the entrymen and gave them two alternatives for raising the money necessary to complete the development required in order to obtain the loan from the insurance company. First, they could pay approximately \$1,000.00 cash and assume a personal liability of \$12,000 to \$14,000 per person. Second, they could sign notes, mortgages and a lease agreement under which they would not be personally liable. However, under this latter arrangement the entrymen would lose title to their entries after final proof and would receive \$10.00 per acre. 187/

The entrymen accepted the latter alternative and presumably abandoned all hope of obtaining title to their entries. It was assumed that Michner and Reed would use their own funds to continue development of the entries and would carry out any arrangements necessary to farm the acreage. To implement the agreement, the entrymen leased their entries to the Indian Hill Irrigation Company, which Michner and Reed controlled. The entries were in turn subleased to a joint venture which was to operate the farms as an integrated unit and which was given an option to purchase the entries for \$200 to \$250 per acre. All this activity occurred prior to approval of the entry applications by the Bureau of Land Management.

Michner and Reed, through a mutual acquaintance, contacted a Mr. Charles Shearman, who was half-owner and vice president of Hood Corporation. Hood Corporation had substantial experience in the construction and installation of irrigation systems, and it furnished the money with which to construct the irrigation system.

By the middle of the summer of 1962 it became apparent that the farming operation was not going to be successful. Hood Corporation had already expended approximately a quarter of a million dollars and, in order to protect its investment, decided to take over full operation of the entire project.

187/ It should be pointed out that these alternatives were poorly documented and the entrymen denied that they promised to give up their entries for \$10.00 per acre. The hearing examiner found against them, however, since, unless the facts were as stated, no real alternative was presented. In the absence of the agreement to convey, the entrymen would have been asked if they would like to pay \$1,000 cash and assume a personal debt or pay nothing and assume no personal debt -- hardly a difficult choice to make assuming all else is equal.

To facilitate this transfer and operation, and to protect the parent company's credit rating, a new subsidiary to Hood Corporation was formed known as Hoodco Farms.

The old lease, mortgage and option agreements between the entrymen and the Indian Hill Irrigation Company were cancelled, and new agreements were executed between Hoodco Farms and all the entrymen. These agreements recited that the entrymen desired to employ Hoodco Farms to develop and improve the entries as might be necessary to enable the entrymen to make final proof.

In order to pay for the installed irrigation works and necessary future development, each entryman executed notes and mortgages which pledged his entry as security for an agreement to pay to Hoodco Farms the sum of \$200 per irrigable acre or, in the alternative, to surrender possession of the entry to Hoodco Farms for a period of up to 20 years. Hoodco Farms was required to develop and improve the entry within the time limit established by the desert land laws. The unusual portion of the agreement permitted Hoodco Farms, at its option, either to farm the land for a period of up to 20 years beginning in 1964 or declare the \$200 per acre note due and payable less 5 percent of its value for each year that Hoodco Farms carried out farming operations.

Pursuant to these agreements Hoodco Farms took over operation of the Indian Hill entries. It developed the 3,000 plus acres as a single integrated unit and not as individual entries. The cost of the facilities placed in the project area totaled \$948,618.00. After the necessary development had taken place, all the entrymen filed final proof and several received patent. Title in these patented entries immediately inured to Hoodco Farms or its successor in interest.

2. Decision

Based on the facts discussed above, the Bureau of Land Management challenged the validity of the final proof declarations and sought to cancel the entries on three grounds: (1) That the original mortgage-lease agreement with the Indian Hill Irrigation Company demonstrated that the entries were made without a good faith intention to reclaim the land; (2) That the entrymen failed to expend the amount of money required by law necessary for the irrigation, reclamation and cultivation of the land; and (3) That the agreements, notes and mortgages with Hoodco Farms constituted prohibited assignments to or for the benefit of a corporation.

Section 321 states "It shall be lawful for any citizen . . . to file a declaration . . . that he intends to reclaim a tract of desert lands" 188/ The case of Chaplin v.

United States, 189/ held that the intention to reclaim a tract of desert land was the very essence of the condition on which entries are permitted. Based upon this reasoning, the Bureau of Land Management claimed that when the entrymen entered into the agreement with the Indian Hill Irrigation Company, which resulted in the entrymen abandoning all hope of ever obtaining title to their entries, they no longer possessed the requisite intent and were not entitled to have their applications for entry approved. Since this transaction occurred before the entries were approved, the Secretary of the Interior held that the entries were fraudulently obtained and should be cancelled.

The Bureau's second basis for cancelling the Indian Hill entries was that the entrymen had not expended the amount required by law for irrigation, reclamation and cultivation. Section 328 states:

No land shall be patented to any person . . . unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for irrigation of the same, at least \$3 per acre of the whole tract reclaimed and patented. . . . 190/

By virtue of the two lease and mortgage agreements with the Indian Hill Irrigation Company and Hoodco Farms, quite clearly the entrymen themselves did not expend \$3 per acre of their own funds, pledge their personal credit, or become personally involved in the reclamation of the desert land entries. The lessee made all required expenditures with no right of contribution from the entrymen. The only way the lessee could recover its investment was by declaring the notes due and payable or by farming the entry.

The entrymen contended that the source of funds is immaterial as long as the reclamation work is completed. However, the Secretary held that entrymen must become personally involved in the expenditures required by the statute. The decision is somewhat obscure in discussing this issue and tends to confuse the issue of good faith discussed previously with the issue of whether the entrymen must personally expend the required \$3 per acre. For example, the decision states:

189/ 193 Fed. 879 (D.C. Cir. 1912), Cert. denied 225 U.S. 705.

190/ 43 U.S.C. §328 (1964). See previous discussion pp. 133-136.

The meaning of [the] words considered alone is clear. . . . No land shall be patented to any person unless he or his assignors shall have expended. . . . \$3 per acre. . . . In passing the desert land law, Congress looked to the entrymen for expenditures in proof. 191/

Although the meaning of this quotation seems clear, its clarity is shadowed by the decision's discussion of two cases, Conway v. United States 192/ and Williams v. Kirk, 193/ which held that the source of funds in reclaiming desert lands is immaterial. In the Conway case the entrymen had entered into a contract by which a third party would clear and cultivate the land and construct a frame dwelling thereon in exchange for timber which was growing on the entry. By analogy this transaction is the same as contracting with a third party to clear and develop a desert land entry in exchange for the crops grown thereon for a period of time. The court upheld the arrangement in the Conway case stating that the question is one of good faith on the part of the settler. The Indian Hill opinion distinguishes the facts in the Conway case from those before it by stating:

The action taken by the . . . entryman in the Conway case was for the purpose of settlement and cultivation of the land by the entryman as opposed to reclamation for the benefit of a corporation. 194/

In the Williams decisions the entrywoman had placed no improvements on the land and whatever work had been done had been done by her brother. That decision contains the following language:

This office cannot seek the source of money expended for the purpose of reclamation or determine private interests under indefinite contracts with reference to such work. These are matters for local courts. Sufficient it is if an entryman causes, in good faith, expenditure of the

191/ 73 I.D. at 429.

192/ 95 F. 615 (8th Cir. 1899).

193/ 38 L.D. 429 (1910).

194/ 73 I.D. at 431.

required amount in permanent improvements for the purpose of reclaiming the entered land.
195/

The Indian Hill decision held that the entryman did not come within the rules stated in the Williams case. But again the distinction was not based on the fact that the entryman had not personally made the required expenditures, but on the language that the entryman must cause expenditures to be made in a good faith effort to reclaim land. The Indian Hill decision states that the evidence discloses that the entryman did not act in good faith and that Hoodco Farms, not the entryman, caused the expenditures to be made for the reclamation.

Based upon the cases discussed, the Indian Hill decision seems to hold that the expenditures required by the desert land laws need not be made personally by the entryman as long as he caused them to be made by a third party while retaining his good faith intent to obtain personal title to the property. However, if the third party makes the expenditures with the goal of obtaining title for himself, then the third party expenditures do not fulfill the requirements of section 328. As will be discussed later, however, administrative interpretation of the decision is much broader than the language of the decision.

The third basis of the Bureau's attack on the Indian Hill entries involved the participation by Hoodco Farms, a corporation, in the management and development of the entries. Section 324 states that no assignment to or for the benefit of a corporation shall be authorized or recognized. Section 329 prohibits anyone from holding desert land entries in excess of 320 acres. The Bureau argued that the long term lease-mortgage plans between the entrymen and Hoodco Farms created invalid assignments and an excess holding in contravention of sections 324 and 329.

On the face of the agreements, no assignments took place as only lease and mortgage arrangements were consummated. However, the Secretary of the Interior, interpreting the term "assignment" very broadly, and looking behind the face of the agreements, reasoned that the interests conveyed were such as to place total control of the entries in Hoodco Farms and indicated that assignments were intended.

The major foundation for the Secretary's finding that assignments were intended and had occurred rested on the clause in the Hoodco Farms contract which permitted Hoodco Farms, at its option, either to farm the land for a period up to 20 years or declare the \$200 per acre note due and payable less 5 percent of its value for each year that Hoodco

Farms had carried out farming operations. By exercising its option not to farm, Hoodco Farms could have demanded immediate payment from each of the entrymen of approximately \$64,000 (320 acres times \$200 per acre). Even if the entrymen had been able to raise this amount, since the entries had been farmed as an integrated unit, substantial additional expenditures would have been required to create individual farm units. If the entrymen could not raise the required sum of money, Hoodco Farms could have declared the notes in default and have obtained legal title through a foreclosure sale. Since it was known by all parties that none of the entrymen had such a sum of money available, and since Hoodco Farms had the absolute power to declare the note due and payable, the Secretary of the Interior interpreted the lease-mortgage agreements as absolute assignments to a corporation.

Even if an assignment could not be shown, the Secretary held that the agreement resulted in an excess "holding" in violation of section 329. The entrymen argued that the term "hold" intends to prohibit the acquisition of legal title, and that conveyance of anything less than the whole interest in the entry would not result in a holding in violation of section 329. The Secretary disagreed with this interpretation, however, stating that the prohibition is against a holding by any means whatsoever. Therefore, he held, any agreement which conveys such an interest or partial interest as would pass the effective control of or benefit from the entry or entries from the entryman to a third party creates a holding by the third party. In this case the right to possess, reclaim, farm, and retain the farming proceeds gave Hoodco Farms complete dominion over the entries and constituted a holding in excess of 320 acres of desert land.

Based upon any one or a combination of all of the reasons discussed above, the Secretary cancelled those entries which had not been patented and ordered the Justice Department to bring court proceedings to cancel those patents which had already been issued.

3. Administrative Interpretation of the Indian Hill Decision

Before discussing the administrative reaction to the Indian Hill decision, an interesting point concerning the published Indian Hill opinion should be noted. The Indian Hill opinion was published in 73 I.D. at page 386. The first page and a half of the opinion contains the headnotes which supposedly give a brief summation of the findings of facts and conclusions of law found in the opinion. However, these headnotes do not merely echo the findings and conclusions; they also interpret the opinion and make broad statements of law isolated from the factual context of the case. For example, the first headnote reads:

An agreement between a desert land entryman and a corporation which gives that corporation the exclusive right to possess the entry and to grow and harvest crops thereon for a term of 20 years, is an assignment to or for the benefit of a corporation within the meaning of the prohibition in [43 U.S.C. §324 (1964)]. 196/

As was noted in the discussion of the Indian Hill decision, the case is not absolutely clear on the point of whether all leases for a fairly long term of years would constitute a prohibited assignment. An important consideration in the Indian Hill case was the existence of Hoodco Farms' option not to farm, but to declare the \$200 per acre notes due and payable. The headnote states as a conclusion that a lease without the option would still constitute a prohibited assignment, but the opinion does not so conclude.

The eighth headnote states:

In order to comply with the requirements of [43 U.S.C. §328 (1964)], a desert land entryman must either expend his own money on the necessary irrigation, reclamation, and cultivation of the entry or incur a personal liability for any money so expended. 197/

This headnote is also much broader than the conclusion that one may reach by reading the opinion. As was noted earlier when discussing the Conway and Williams cases, the opinion can be interpreted as not requiring the entryman to expend his own money or incur personal liability as long as he retains a good faith intent to reclaim a tract of desert land for himself. To be sure, failure to personally expend the required funds may invite an investigation of the entryman's good faith. However, the opinion did not clearly hold that in all cases personal expenditure or personal liability is required. Once again, the headnote is interpreting the body of the opinion rather than paraphrasing it.

Whether or not these headnotes have served their proper purpose, they, rather than the opinion itself, have been the

196/ 73 I.D. at 386.

197/ Id.

basis for subsequent administrative action. Late in 1966 a clarifying memorandum was sent to the Director, Bureau of Land Management, from the Secretary of the Interior. 198/ In this memorandum, the Secretary presents two lists of conditions which must be fulfilled before a desert land entry will be permitted or a patent will be issued. The second list, in point of location in the memorandum, is purported to be a summation of the conclusions reached in the Indian Hill decision and states as follows:

1. An agreement between a desert land entryman and a corporation, which gave that corporation the exclusive right to possess the entry to grow and harvest crops thereon for a term of twenty years, was an assignment to or for the benefit of a corporation within the meaning of the prohibition in [43 U.S.C. §324 (1964)].
2. A corporation which acquired actual possession or the right of actual possession through agreements with individual desert land entrymen to more than 320 acres of desert land "held" such acreage within the meaning of the prohibition of [43 U.S.C. §329 (1964)].
3. A desert land entryman did not comply with the requirements of [43 U.S.C. §328 (1964)] unless he either expended his own money on the necessary irrigation, reclamation and cultivation of the entry or incurred a personal liability for any money so expended.
4. [43 U.S.C. §321 (1964)] requires a desert land applicant to file a declaration under oath that he intends to reclaim the tract of desert land for which he is making application for entry and his actual intent to reclaim is of [sic] the essence of the condition upon which the entry is permitted. 199/

198/ Memorandum from the Secretary of the Interior to the Director, Bureau of Land Management, December 30, 1966.

199/ Memorandum from the Secretary of the Interior to the Director, Bureau of Land Management, December 30, 1966 at 2.

These conclusions are copied almost verbatim from the headnotes of the published Indian Hill decision. Therefore, the headnotes, rather than the body of the opinion, have become the applicable administrative standards.

The memorandum also warns entrymen that future group applications must contain sufficient information to insure that an Indian Hill situation does not arise again. Allowance of the applications are to be subject to the following conditions:

1. It must be affirmatively shown that the proposal is feasible from the engineering point of view.
2. It must be affirmatively shown that the proposal will be economically feasible over a sufficient period, and the soil conditions and other physical characteristics are such, as to give reasonable assurance of continued production under proper conservation management.
3. It must be affirmatively shown that each entry involved in the proposal taken independently is economically and physically feasible, taking into consideration its proper share of joint costs.
4. Full disclosure regarding the arrangements, financial and otherwise, among the applicants and with others must be made by each applicant so that the Bureau can make an informed judgment as to whether the arrangements are consistent with the applicable statutes and regulations and that they do not constitute a device to shield fraud. In this regard, the Bureau should require every applicant for a desert entry to disclose under oath the full details of any such arrangements, whether or not it appears on the face of the application that a group project is planned. 200/

Pursuant to the memorandum, the Idaho office of the Bureau of Land Management prepared a form letter for transmittal to all applicants for entries within the state. This letter succinctly lists five legal requirements for application for desert entry:

1. You must have a good-faith intent to reclaim the land for your own benefit. That intent is the essence of the condition upon which entry is permitted.

2. You may not assign your entry to a corporation.

3. You may not, before receiving patent, enter into any arrangement to transfer title to the land after a patent has issued.

4. You may not enter into any arrangement which has the effect of permitting anyone to hold more than 320 acres of desert entry land.

5. You must expend your own money on the necessary irrigation, reclamation and cultivation of the entry or incur a personal liability for any money so expended.

The letter goes on to inform the applicant of the requirements of economic and engineering feasibility and the necessity of filing a sworn statement explaining in detail the financial arrangements with regard to development of the entry.

As a result of the Indian Hill decision, the Secretary of the Interior's memorandum and the Bureau of Land Management's form letter, the preparation of applications, particularly group applications, for desert land entries has become a very expensive, highly legalistic process. The supporting documents for a recent Idaho application which included the formation of an irrigation company known as the Bell Rapids Mutual Irrigation Company consisted of a several hundred page document prepared by an internationally known engineering firm. The cost of such a study, which included soil tests, economic feasibility studies, breakdowns of estimated capital and annual costs, and other detailed information which is required by the Bureau of Land Management before an application will be processed, was probably many thousands of dollars. In addition, a model application for entry was prepared with numerous exhibits such as legal agreements for the construction of irrigation systems and the leasing of the entries for farm operation purposes. The legal costs for such work probably also reached several thousand dollars. With all this capital investment required prior to application it would seem, at least in this case, that prospective entrymen no longer fit the historical picture of the poor pioneer coming west in search of a chance to break new ground.

H. Final Proof - Procedure

The procedure for filing final proof under the desert land laws is almost identical to the procedure required under the homestead laws. 201/

When the entryman has reclaimed the land and is ready to make final proof he should apply to the manager of the district land office for a notice of intention to make final proof. In addition to supplying the general information discussed in the Homestead Act chapter, the notice must bear an endorsement specifically indicating the source of water supply. 202/ If the proof is made by an assignee, his name, as well as that of the original entryman, must be stated. 203/ The notice, like Homestead Act notices, must name four witnesses, two of whom will be called upon to testify at the time proof is made.

Upon receipt of the application, the manager of the local land office will issue a notice of intention to file final proof which must be published once a week for five successive weeks in the newspaper of general circulation published nearest the lands. The claimant must pay the costs of publication, but the manager of the land office will procure publication and insure that the notices are in proper form. 204/

Submission of final proof is carried out in the same manner discussed in the Homestead Act chapter, and is based on similar affidavits. 205/

Upon successful submission of final proof, the patent is issued and title passes to the entryman. Thereafter the land is his and not subject to further provisions of the desert land law.

I. Desert Land or Homestead Entry
Within Certain Approved
Irrigation Districts

One additional enactment to encourage entry and reclamation of the public domain should be mentioned at this point. In 1916, Congress adopted what is popularly known as the "Smith Act". 206/ The Smith Act authorizes the Secretary of the Interior to investigate the plans and financial and physical resources of state irrigation districts which include public lands within their boundaries to ascertain if they are properly organized and have planned and are actively carrying out a meritorious irrigation

202/ 43 C.F.R. §2226.1-5(b) (1968).

203/ Id.

204/ 43 C.F.R. §2226.1-5(c) (1968).

205/ 43 C.F.R. §2226.1-5(d) (1968).

206/ Act of August 11, 1916, ch. 319, 39 Stat. 508 (codified as amended at 43 U.S.C. §621 et seq. (1964)).

project. If a positive finding is made, the Secretary may approve the district's plans and accept the district as a source of water supply for the irrigation of the public lands. As used in the act the term public lands includes unentered public lands and lands legally covered by unpatented entries. 207/

The Smith Act has relevance for both the desert land and homestead entryman as either type of entry may be made on the public land within the boundaries of an approved irrigation district, provided that the land is otherwise open to entry. However, since the Smith Act will most likely apply in semi-arid areas which require artificial irrigation for the profitable production of crops, the program is much more relevant to the desert land entry situation.

Upon approval of the irrigation district, the public lands within the district become subject to local law relating to the organization, government and operation of the irrigation district. 208/ However, most importantly, the costs of constructing, acquiring, purchasing, or maintaining the irrigation system within such an approved district are equitably apportioned among both private and public lands. Further, all such charges legally assessed by the district become a lien upon the public lands even though they are and remain public lands. 209/

As to unentered public lands, this lien may not be enforced by a tax sale, but an application to enter such lands will be subject to the previously levied taxes and assessments and will not be allowed until the applicant presents a certificate from the proper district or county officers showing that he has paid any such taxes or assessments due. 210/

With regard to entered public lands, the lien may be enforced in the same manner and under the same procedures whereby liens are enforced against lands held in private ownership. 211/ Therefore, such lands may be sold at a tax sale.

The Smith Act establishes certain requirements which must be met by the party who purchases the land at the tax sale.

207/ 43 U.S.C. §622 (1964).

208/ 43 U.S.C. §621 (1964); 43 U.S.C. §623 (1964).

209/ 43 U.S.C. §622 (1964).

210/ 43 U.S.C. §627 (1964).

211/ 43 U.S.C. §626 (1964).

First, before the purchaser may obtain a patent on the land he must, in addition to paying the tax sale price, pay the Federal minimum price of \$1.25 per acre and show that irrigation works have been constructed and that water of the district is available to irrigate such lands. Second, the purchaser must, at the time of application for patent, have the qualifications of a desert land entryman or homestead entryman. Finally, not more than 160 acres of land may be patented to any one purchaser under the provisions of the Smith Act. 212/

CHAPTER 4

THE INDIAN HOMESTEAD AND ALLOTMENT LAWS

A. Introduction

The fact that the United States still has valid laws on its books which originated from assumed racial differences may come as a surprise to many. Nevertheless, this is so. The laws referred to are those pertaining to Indian homesteads and allotments on the public domain. Much of the impetus for the laws granting allotments off of the Indian reservations and permitting Indians to homestead came from the belief that because the Indian was of a different race and civilization he was in need of special laws. Another and very important reason for these laws was that until 1924 most Indians lacked citizenship and could not obtain it and therefore were not qualified to obtain homesteads under the general homestead laws. In some instances the allotment laws provide the Indians special benefits, and in other instances they impose special restrictions upon him. This study, not being directed toward racial problems, will leave for others to decide whether laws granting special benefits or imposing added restrictions based upon one's national origin help or hinder the achievement of racial equality.

As might be expected, the disposal statutes giving special recognition to Indians are not of very recent origin. The Department of the Interior's book on Federal Indian law states that the origins of the allotment system are to be found in the Indian treaties and that as early as 1798 tribal lands were allotted to individuals and families. 1/ During the first half of the nineteenth century allotments and the division of tribal lands were generally covered by treaties. The first major act giving Indians the right to settle on the public domain and acquire a homestead was passed in 1875. Following that, other Indian homestead and allotment laws were passed by Congress and in 1887 the "General Allotment Act" was adopted. This has been amended and added to down through the years.

The Indian allotment laws have many similarities to the

1/ Office of the Solicitor, Department of the Interior, Federal Indian Law 773 (1958).

general homestead laws but there are definite differences in who is eligible to obtain land, the lands to which the laws apply, the requirements of entrymen and the types of patents given. These differences are the subject of this chapter, which deals with homesteads and allotments on the public domain. This study does not cover Indian reservation lands and all references to allotments are to those on the public domain only and not to reservation allotments, unless otherwise specified. 2/

B. The Statutory Basis of Indian Allotments and Homesteads

There are a great many laws pertaining to Indian allotments, but most of them deal with reservation lands. The principal statutes relating to Indian homesteads and allotments on the public domain were set forth in six Congressional acts. Before getting into the details of the laws, regulations and policies governing Indian allotments, it may be helpful to identify and briefly describe these six acts and some general rules the courts have applied in interpreting all Indian allotment and homestead laws.

1. The Principal Homestead and Allotment Statutes

a. The Indian Homestead Act of 1875

In 1875 Congress tacked on to a supplemental appropriation bill a section permitting Indians to take advantage of the homestead laws. 3/ This act provided that any Indian born in the United States who is the head of a family or twenty-one years old and who has abandoned or will abandon his tribal relations shall be entitled to the benefits of the Homestead Act of 1862, 4/ except for the provisions pertaining to commutation of homesteads, and subject to two provisos. The first was that the title to land acquired by any

2/ For a critical appraisal of the allotment system, particularly as it effects reservations see Hearings on H.R. 7902 Before the House Committee on Indian Affairs, 73d Cong., 2d Sess., pt. 7, at 15-18, 32-33 (1934).

3/ Act of March 3, 1875, ch. 131, sec. 15, 18 Stat. 420 (codified at 43 U.S.C. sec. 189 (1964)).

4/ Act of May 20, 1862, ch. 75, 12 Stat. 392

Indian under the act would not be subject to alienation or incumbrance, either voluntarily or by the judgment, decree, or order of any court, for a period of five years from the date of the patent. The second proviso was that any Indian taking advantage of the new law would continue to be entitled to his distributive share of tribal property as though he had maintained his tribal relations and any transfer, alienation or incumbrance of any interest in such tribal property would be void.

While the 1875 Act was the first statute expressly making Indians eligible to obtain title to a portion of the public domain, it had long been the policy of the Department of the Interior "not to disturb the possession and occupancy of Indians who have long resided upon the public lands, and have cultivated and improved the same". 5/

b. The Winnebago Indians Act of 1881

In 1881 Congress passed a law entitled "An act for the relief of the Winnebago Indians in Wisconsin, and to aid them to obtain subsistence by agricultural pursuits, and to promote their civilization". 6/ This act provided funds to aid those Winnebago Indians who could not otherwise obtain homesteads under the 1875 Act because of poverty to do so. Section 5 of this act provided that the title to lands entered by the Winnebago Indians under the 1875 Act would not be subject to alienation or incumbrance, either voluntarily or by court decree, "or subject to taxation of any character, but shall be and remain inalienable and not subject to taxation for the period of twenty years from the date of the patent issued therefor". 7/ This act also specified that the section prohibiting alienation for twenty years must be inserted in every patent issued pursuant to the act. The significant features of this act are the extension of the restriction against alienation to twenty years and the specific language that during this period the land will not be subject

5/ Cramer v. United States, 276 F. 78, 80 (9th Cir. 1921). See also Schumacher v. State of Washington, 33 L.D. 454, 456 (1905); Ma-Gee-See v. Johnson, 30 L.D. 125 (1900).

6/ Act of January 18, 1881, ch. 23, 21 Stat. 315.

7/ Id. sec. 5 (emphasis added).

to taxation of any kind.

c. The Indian Homestead Act of 1884

On July 4, 1884, the second Indian homestead law became effective. 8/ It provided that Indians then located on public lands or who might thereafter so locate could "avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States". 9/ The act provided that no fees or commissions would be charged to Indian homesteaders. It also provided that all patents for such homesteaded land would declare that the United States held and would hold the land in trust for twenty-five years for the sole use and benefit of the Indian, or in the case of his decease for his widow and heirs, and that at the expiration of such twenty-five year period the United States would convey the land by patent free of all trust to the Indian or his widow and heirs.

There are two major differences between this act and the earlier one of 1875. First, the 1875 Act was limited to Indians who had abandoned or would abandon their tribal relations whereas this act granted homestead privileges to all Indians whether they abandoned their tribal relations or not. And second, the earlier act contained only a five-year period during which the Indian could not alienate the land whereas this act provides for a twenty-five year period, during which the land is held in trust by the United States. The difference between these two acts was thoroughly discussed in Hemmer v. United States 10/ where the court said:

If the act of 1875 and the act of 1884 be read as one act passed at the same time, they provide that there is granted to non-tribal Indians the right to acquire homesteads upon payment of the officers' fees subject to a restriction on alienation for 5 years, and

8/ Ch. 180. sec. 1, 23 Stat. 96 (codified at 43 U.S.C. sec.190 (1964)).

9/ Id.

10/ 204 F. 898 (8th Cir. 1912), aff'd 241 U.S. 379 (1916). For a more complete excerpt of the discussion of the difference between these two statutes see Appendix D. p. D-30 et seq.

that there is granted to all Indians the right to acquire homesteads subject to a restriction on alienation for 25 years without the payment of any officers' fees. 11/

d. The General Allotment Act of 1887

The major statute regarding allotments, which is usually referred to as the General Allotment Act, was adopted in 1887. 12/ The provisions of this act, as later amended, are the basis of the present Indian allotment laws and regulations. This act provided for allotments both on and off the reservation. Section 4 pertains to allotments off the reservation and quite often in the decisions and regulations these are referred to as section 4 or fourth section allotments.

Section 4 stated that any Indian not residing upon a reservation or for whose tribe no reservation had been provided who makes settlement upon any surveyed or unsurveyed unappropriated United States lands shall be entitled to have such lands allotted to him or her or his or her children in the same quantity and manner as provided for allotments to Indians on reservations. The act as passed in 1887 provided for allotments of one-quarter of a section to the head of a family, one-eighth of a section to single persons over eighteen years of age and to each orphan child under eighteen and one-sixteenth of a section to all other single persons under eighteen. The act further provided that if the land to be allotted was valuable only for grazing purposes, an additional allotment of such grazing land could be made to each individual. In other words, for grazing lands the quantities were to be doubled.

The act contained language similar to the 1884 Indian homestead law providing that any patents issued must declare that the United States holds the land in trust for twenty-five years. It also provided that the President could extend the trust period at his discretion.

11/ Id. at 908

12/ Act of February 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. sec. 331 et seq. (1964)).

The law contained details concerning the method of obtaining allotments and rights of survivors and heirs in the event of the death of the allottee. One of the most significant differences between this law and the previous ones discussed is that it provided for allotments not only to an adult Indian but to his minor children as well.

e. The Allotment Act of 1891

In 1891 Congress amended the General Allotment Act of 1884 by standardizing the size of all allotments for all Indians, whether the head of a family or a minor child, at one-eighth of a section or double that amount if the land was valuable only for grazing purposes. ^{13/} This change applied equally to allotments on reservations and allotments on public lands.

f. The 1910 Amendments to the General Allotment Act

The General Allotment Act was amended again in 1910 by amending sections 1 and 4 of the 1891 Act. ^{14/} The changes relating to non-reservation allotments provided that the allotments would be made on the public domain "in such areas as the President may deem proper" and that they would not exceed "forty acres of irrigable land or eighty acres of non-irrigable agricultural land or one hundred and sixty acres of nonirrigable grazing land to any one Indian." ^{15/}

A comparison of the differences among the provisions in the six laws just discussed concerning who may obtain allotments, the size of allotments, and the length of the trust period is shown in Table 1 on page 211. The General Allotment Act of 1887 as amended by the 1891 and 1910 statutes is generally the prevailing law today as to the matters covered in Table 1.

^{13/} Act of February 28, 1891, ch. 383, sec. 4, 26 Stat. 795 (Codified as amended at 25 U.S.C. sec. 336 (1964)).

^{14/} Act of June 25, 1910, ch. 431, sec. 17, 36 Stat. 860 (Codified at 25 U.S.C. secs. 331, 336 (1964)).

^{15/} 43 U.S.C. sec. 336 (1964).

2. Some General Rules Applied in Construing Indian Homestead and Allotment Laws

When considering the Indian homestead and allotment laws, the courts have consistently followed three general rules: namely, (1) that the Indian homestead and allotment acts must be considered together as part of a single system of laws, (2) that these laws are to be liberally construed for the benefit of Indians with all doubtful expressions being resolved in their favor, and (3) that the purpose of these laws is to break up tribal relations and encourage the Indians to become individual landholders and adopt civilized ways. The application of these general rules very often has determined the results in specific cases. Because of their overall importance some consideration should be given to them before getting into more detailed aspects of allotments and homesteads.

a. The Indian Homestead and Allotment Laws are "in pari materia"

The relationship of the allotment acts to the Indian homestead laws was thoroughly discussed in the case of Jim Crow, ^{16/} where the Assistant Attorney General stated:

The general allotment act, so far as it affects public lands, and the preceding Indian homestead provisions, are so clearly connected that they should be construed in pari materia as relating to the same subject-matter. The later allotment act but carries forward the policy of the former enactments to give Indians a right to secure homes upon the public domain.

Congress has recognized that allotment claims are of the same nature as homestead rights

. . . Claims under the various laws relating to Indian homesteads may with equal propriety be characterized as allotments. In fact the terms mean substantially the same thing so far as the laws in which they

^{16/} 32 L.D. 657 (1904).

are found affect the public lands and so far as the interests of the Indian claimant are concerned.

This Department has considered Indian homesteads upon practically the same footing as Indian allotments upon the public lands These rules apply also to Indian allotments. The control, jurisdiction and obligations of the Department are the same in one case as in the other.

The objects of the laws relating to Indian homesteads are the same as those relating to Indian allotments on the public lands, the status of the Indian claimant is the same under both classes of laws, the duties and obligations of the government are the same. Both the legislative and the executive branches of the government have recognized these similarities of purpose in the laws, standing of claimants thereunder and obligations of the government. 17/

The Supreme Court has also stated that the homestead and allotment acts are to be considered together. In United States v. Jackson 18/ it said:

We find that the Indian Homestead Act of July 4, 1884, and the General Allotment Act of February 8, 1887, with its various amendments, constitute part of a single system evidencing a continuous purpose on the part of the Congress. The statutes are in pari materia, and must be so construed If there were any doubt on the question the silence of Congress in the face of the long continued practice of the Department of the Interior in construing statutes which refer only to Indian "allottees", or Indian "allotments", as applicable also to Indians claiming under the homestead laws, must be considered as "equivalent to consent to continue

17/ Id. at 659.

18/ 280 U.S. 183 (1930).

the practice until the power was revoked by some subsequent action by Congress". 19/

b. The Indian Homestead and Allotment Laws Are to Be Construed Liberally in Favor of the Indians

The second basic rule that is applied in interpreting these laws is that the statutes must be liberally construed with all doubtful expressions being resolved in favor of the Indians. 20/ One court has stated that in interpreting ambiguous statutes with reference to Indians, a liberal interpretation in favor of the Indians should be indulged, even though a meaning not currently common must be applied to harmonize the context or to more fully advance the policy and objectives of the legislation. 21/ Another court put it thusly:

Because of the duty and obligation of the national government to the Indian tribes and its "avowed solicitude *** for the welfare of its Indian wards" it is "the rule of construction recognized without exception for over a century *** that 'doubtful expressions, instead of being resolved in favor of the United States, and to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith'". 22/

The Supreme Court has stated: "According to a familiar rule, legislation affecting the Indians is to be construed in their interest and a purpose to make a radical departure is not lightly to be inferred." 23/

19/ Id. at 196-7. See also United States v. Midwest Oil Co., 236 U.S. 459, 481 (1915); Toss Weaxta, 47 L.D. 574, 576 (1920).

20/ Big Eagle v. United States, 300 F. 2d 765, 769 (Ct. Cl. 1962).

21/ Sakezzie v. Utah State Indian Affairs Commission, 215 F. Supp. 12 (D. Utah 1963).

22/ Haley v. Seaton, 281 F. 2d 620, 623 (D.C. Cir. 1960), footnote citing United States v. Santa Fe Pacific R.R., 314 U.S. 339, 353, 354 (1941) and Choate v. Trapp, 224 U.S. 665, 675 (1912).

23/ United States v. Nice, 241 U.S. 591, 599 (1916).

c. The Purpose of the Allotment and Homestead Laws

The purpose of the Indian allotment and homestead laws was expressed in 1889 in an opinion from the Assistant Attorney General to the Secretary of the Interior ^{24/} construing the General Allotment Act of 1887. In that opinion it was stated:

The act we are now considering is, in its essential elements, a settlement law. Its immediate purpose is to obliterate the tribal relations of the Indians so far as to induce them to become individual land-holders; thence, stepping by easy gradations, it is hoped, along the path of civilization into the dignity of citizenship. ^{25/}

This interpretation of the laws has been restated in virtually the same way in many decisions. ^{26/} This purpose of the allotment laws was stated in a negative form in the case of Henry Ford ^{27/} as follows:

The general allotment act was not intended to give allotments to those Indians who have already severed their tribal relations and received the full benefit of the pre-emption and homestead laws. ^{28/}

24/ 8 L.D. 647 (1889)

25/ Id. at 650

^{26/} For instance, in Amy Hauser (On Review), 20 L.D. 46, 50 (1895) the following language was used: "The Indian allotment laws have one common purpose. that of breaking up tribal relations, encouraging the Indians to become individual land owners and citizens, with the right to assert and protect their individual and property rights as other citizens of the United States." In Louis W. Breuninger, 42 L.D. 489, 491 (1913) it was stated: "The privilege of taking an allotment is offered tribal Indians to induce them to abandon the tribal relation and separate themselves from the tribe." See also Cynthia Martha Sweeney, 40 L.D. 148, 150 (1911).

27/ 12 L.D. 181 (1890).

28/ Id. at 182

In 1924 Congress granted citizenship to Indians. ^{29/} If the purpose of the allotment and homestead laws had been interpreted solely to induce the Indians to become citizens it could be argued that the 1924 Act abolished the need for Indians' allotments or homesteads. However, the 1924 citizenship law specifically provided that the granting of such citizenship would not in any manner impair or otherwise affect the right of any Indian to tribal or other property. In a decision construing the 1924 Act, the Secretary of the Interior stated:

Notwithstanding the gift of citizenship the applicant remains an Indian by race. Then, too, it is a familiar rule that legislation affecting the Indians is to be construed in their interest and the purpose to make a radical departure is not likely to be inferred. This is especially true since the privilege of taking an allotment on the public domain is offered tribal Indians to induce them to abandon their tribal relations and separate themselves from the tribe. ^{30/}

Thus, the chief purpose of the Indian allotment and homestead laws after Indians had gained citizenship remained as it always was -- to induce the Indians to give up their tribal relations and become landowners. Apparently this is still the purpose of the laws as there is no official indication that the purpose has changed.

C. The Eligibility Requirements for Indian Allotments

Under the allotment and homestead laws not only adult male Indians eligible to obtain land but in certain instances their wives, children and heirs may also receive patents to public domain lands. The eligibility of these different classes is not always the same.

1. General Eligibility Requirements

The Indian homestead laws, in contrast to the allotment laws provide benefits for only the Indian himself unless he should die during the trust period in which case his rights may accrue to his widow or heirs. The 1875 Indian Homestead Act provides: "That any Indian born in the United States, who is the head of a family, or who has arrived at the age of twenty-one years, or who has abandoned, or may hereafter abandon his tribal relationships shall be entitled to the bene-

29/ Act of June 2, 1924, ch. 233, 43 Stat. 253.

30/ Simonsen v. Toh-La-Zhinie-Bega, 51 L.D. 379, 383 (1926) (citations omitted).

fit of the homestead laws." The 1884 Indian homestead law says Indians located on public lands can avail themselves of the provisions of the homestead laws to the same extent as may be done by citizens of the United States. The allotment legislation sets forth no particular requirements concerning the eligibility of an Indian for an allotment. The allotment laws do require the Indian to make settlement on the land sought for allotment and this, by simple logic, means he cannot continue to reside on a reservation. But other than that there are no other statutory requirements.

The regulations of the Department of the Interior require an applicant for an allotment to obtain a certificate from the Commissioner of Indian Affairs showing that he is an Indian and entitled to an allotment. 31/ The applicant must show he is a member of a tribe or entitled to be recognized as a member. The qualifications for tribal membership may be shown by the laws and usages of the tribe. The mere fact that a person is a descendant of someone who was once recognized as a member of the tribe does not of itself make that person a member of the tribe. In other words, the possession of Indian blood, not accompanied by tribal affiliation, does not entitle a person to an allotment on the public domain. 32/

There is some indication that at one time the Department of the Interior may have been reluctant to grant allotments to anyone not a full-blooded Indian. However, in 1907 Secretary of the Interior Garfield sent instructions to the Commissioner of Indian Affairs stating: "If the practice has been to refuse allotments to those having white blood, it was a mistake. The quantum of Indian blood or of white blood possessed by the applicant does not control and should not, of itself, influence the decision as to his right to an allotment." 33/

The present regulations provide that tribal membership, even though once existing and recognized, can be abandoned as far as the benefits of a public domain allotment are concerned. 34/ Prior to 1924 it had been held that an Indian who had abandoned his tribal ways and voluntarily taken up the habits of civilized life became a citizen under section 6 of the General Allotment Act, and thereby lost his right to an allotment. 35/

31/ 43 C.F.R. sec. 2212.0-6(b) (1968).

32/ 43 C.F.C. sec. 2212.0-6(a) (1968).

33/ Instructions, 35 L.D. 549, 550 (1907). See also Ellen Bourassa, 43 L.D. 149 (1914).

34/ 43 C.F.R. sec. 2212.0-6(a) (1968).

35/ Louis W. Breuninger, 42 L.D. 489 (1913).

This was based on the general premise that one of the purposes of the allotment laws was to get Indians to take up citizenship. It was reasoned that if he acquired citizenship without receiving an allotment there was no longer any need to give him one. Of course, as a citizen he was eligible to the benefits of the homestead laws like any other citizen. With the passage of legislation in 1924 36/ granting citizenship to all Indians and expressly reserving their rights to property, an Indian no longer is ineligible to an allotment because of citizenship. The key question is whether he has abandoned his tribal membership.

An Indian can lose his right to an allotment or an Indian homestead if he has received the full benefit of the general homestead laws. 37/ Prior to 1924 this rule could be supported either on the ground that the Indian had taken up citizenship and thereby given up his Indian rights, or on the ground that he had abandoned his tribal membership. Today it can be supported only on the latter ground.

Just as an Indian who has received a homestead cannot obtain an allotment, an Indian who has been granted a full allotment and accepted, enjoyed and sold it, is ineligible for a second allotment. 38/ However, there is nothing in the statutes to indicate whether Congress ever intended to allow a second allotment if the first one was not a full allotment. The allotment laws state that an Indian shall be entitled to an allotment "not to exceed" the quantities set forth in the statutes. Instructions issued by the Department of the Interior less than two months after the passage of the General Allotment Act provided for the right of Indians to additional allotments. In those instructions the Secretary of the Interior stated:

(T)hat each Indian who has heretofore received an allotment of a less quantity of land than is provided for in the said act of February 8, 1877, (sic. - 1887) should receive an additional allotment sufficient to make the entire quantity allotted equal to that named in said act. 39/

36/ Act of June 2, 1924, ch. 233, 43 Stat. 253.

37/ Henry Ford, 12 L.D. 181 (1890).

38/ Amy Hauser (On Review), 20 L.D. 46 (1895); Tiger v. Twin State Oil Co., 48 F.2d 509 (10th Cir. 1931).

39/ Instructions. 5 L.D. 520 522 (1887).

The eligibility of an Indian to an additional allotment is still recognized in the present regulations 40/ and presumably in the absence of any Congressional action to the contrary, it can be assumed that the Secretary correctly interpreted the original intent of Congress as permitting additional allotments.

2. The Eligibility of Indian Women

The Indian allotment laws stated that when an Indian meets certain qualifications "he or she" shall be entitled to an allotment. 41/ The only reference to gender in the Indian homestead laws is in the 1884 statute which provides that the United States will hold the patent in trust for twenty-five years for the benefits of the Indian or in case of his death his widow. 42/

The regulations governing allotments refer to "he and she" in discussing an Indian's eligibility. 43/ Thus, an Indian woman has as much right to an allotment as a man if she can otherwise qualify. However, if she is married she may face some problems in obtaining an allotment. The regulations provide that where she is married to a white man or other person not entitled to an allotment and not a settler or entryman under the general homestead law her right to an allotment and that of her minor children born of such marriage will be determined without reference to the quantum of Indian blood she and her children possess but solely with reference as to whether they are recognized member of a tribe or are entitled to such membership. 44/ The regulations provide that an Indian woman married to an Indian man who has himself received an allotment or is entitled to one is not deprived of the right to file an application for herself provided she is otherwise entitled to do so, and she may also apply for her minor children if her husband is for any reason disqualified. 45/ The regulations also state that an Indian woman who is separated from her husband and who has not received an allotment will be regarded as the head of a family and may file an application for her

40/ 43 C.F.R. sec. 2212.1-4(a)(2) (1968).

41/ 25 U.S.C. secs. 334, 336 (1964).

42/ 43 U.S.C. sec. 190 (1964).

43/ 43 C.F.R. sec. 2212.0-3(a) (1968).

44/ 43 C.F.R. sec. 2212.0-6(e)(1) (1968).

45/ 43 C.F.R. sec. 2212.0-6(e)(2) (1968).

minor children. When she files an application for her minor children she must show that she has applied for herself and has used the land sought in some beneficial manner. 46/

The present right of an Indian woman married to a white man or to an Indian who has received an allotment or a homestead was not always recognized. Prior to the time that all Indians were granted citizenship (1924) the rule was that the Indian homestead and allotment laws were for the benefit of only those Indians who had not already obtained citizenship. An 1888 Act 47/ provided that an Indian woman who married a citizen became a citizen by virtue of her marriage and the Attorney General held that a woman was no longer eligible for an allotment. 48/

Today the only handicap that an Indian woman might have in obtaining an allotment is in meeting the settlement requirements if she is married and living with her husband on his land or on land that he is claiming for an allotment or a homestead. In order to perfect an allotment or homestead the Indian woman must settle on the land she is claiming. It might be impossible for her to show such settlement if she is residing with her husband elsewhere.

3. The Eligibility of Minor Children

The General Allotment Act not only provides for allotments to an Indian but also for allotments to his or her children. This is a rather unique feature. There is no similar provision in either the homestead or desert land laws. As adopted in 1887 the General Allotment Act provided a different allotment for the head of the family than for children. 49/ The 1891 amendment standardized the allotment for all persons. While the 1910 amendment changed the quantity of allotments depending on whether the land was irrigable or nonirrigable, it continued to make the allotment the same for everyone whether he was the head of a family or a child. So today the allotment available for children is equal in quantity to that of adults.

46/ 43 C.F.R. sec. 2212.0-6(e)(3), (4) (1968).

47/ Act of August 9, 1888, ch. 818, secs. 1-3, 25 Stat. 392 (codified at 25 U.S.C., secs. 181-83 (1964)).

48/ Opinion, Assistant Attorney General to the Secretary of the Interior 32 L.D. 417 (1902).

49/ See Table, 1. p. 211.

Except for the express reference in the original language of the General Allotment Act to orphan children, there has been no statutory indication of what Congress meant by the word "children". At one time the Commissioner of the General Land Office held that the minor step-children of an Indian were not included within the provisions of the general allotment law. However, the Secretary of the Interior reversed the Commissioner's decision and stated:

The argument seems to be that because the act makes no provision for selection of allotments by "step-parents" for their "step-children," such applications are not permissible. This is giving the law an altogether too restrictive construction. The purpose of that law is to give the Indians who have settled on the public domain and to their immediate families allotments of land and to place them in the same position they would have occupied had they been living upon an Indian reservation. To carry out this purpose, the law should be construed to permit applications by one entitled himself to take allotment in behalf of all those whom he stands in loco parentis. 50/

The present regulations regarding minor children continue this broad interpretation of the eligibility of children. 51/ These regulations make two types of children ineligible for allotments. These are orphan children and children born after the time their parent obtains an allotment. The denial of allotments to orphan children is apparently based on the statutory language requiring an Indian to make settlement in order to be entitled to an allotment for himself and his children. The Department of the Interior has maintained that if a parent

50/ Kin-Nip-Pah, 41 L.D. 626 (1913).

51/ "An Indian settler on public lands under the fourth section of the act of February 8, 1887, as amended is also entitled upon application to have allotments made thereunder to his minor children, stepchildren, or other children to whom he stands in loco parentis, provided the natural children are in being at the date of the parent's application, or the other relationship referred to exists at such date. The law only permits one entitled himself under the fourth section to take allotments thereunder on behalf of his minor children or of those to whom he stands in loco parentis. Orphan children (those who have lost both parents) are not entitled to allotments on the public domain unless they come within the last-mentioned class. 43 C.F.R. sec. 2212.0-6(d) (1968).

is not entitled to an allotment no allotments can be made on behalf of his minor children, because their rights are dependent upon his rights. 52/

The regulation denying allotments to children born after the time the parent obtains his allotment appears to have its origin in the original provision of the General Allotment Act granting citizenship along with allotments. Before all Indians were granted citizenship by Congress, it was held that when the parent obtained his allotment and thereby got his citizenship his after-born children were automatically citizens and therefore ineligible for allotments. 53/ Today this reason for discriminating against after-born children no longer is valid. Nonetheless, the restriction still applies. The after-born child is somewhat like a pretermitted heir except he does not have the benefit of any statute to protect him. What effect this discrimination against the later born child has upon sibling rivalry in Indian families is not indicated by any of the decisions on Indian allotments.

4. The Eligibility of Heirs

In addition to Indians, wives and children being eligible for allotments, in some instances the heirs of Indian settlers and applicants may obtain allotments. The trust provisions in the allotment and Indian homestead laws provide that if the Indian for whom the patent is being held in trust dies during the trust period the United States will continue to hold the patent in trust for his heirs. 54/ By regulations the Department of the Interior has expanded the rights of heirs to permit them to obtain allotments in those instances where the Indian dies after settlement but prior to the approval of his allotment. 55/

The regulations also provide that if the Indian dies during the pendency of his application and the Government learns of his death, the heirs are to be notified that they will be allowed

52/ Albert A. Coursolle, 44 L.D. 188, 191 (1915). See also Cynthia Martha Sweeney, 40 L.D. 148 (1911); and Opinion Assistant Attorney General to the Secretary of the Interior, 8 L.D. 647, 648 (1889) stating: "Orphan children, . . . do not seem to come within the benefits of this fourth section inasmuch as the enumerated beneficiaries therein are the Indian settlers and their children".

53/ Oliver C. Keller, 44 L.D. 520 (1916).

54/ 25 U.S.C. sec. 348 (1964); 43 U.S.C. sec. 190 (1964).

55/ 43 C.F.R. sec. 2212.0-6(c) (1968).

ninety days within which to submit proof that the applicant had settled on the land applied for during his lifetime. The failure to submit such proof within the time allowed will cause the application to be rejected. 55/

There have been a great many administrative and court cases over the years involving the determination of heirs, but these deal with matters that are more related to probate law than the use of public lands for intensive agriculture. It is sufficient here to note that when an allottee dies during the trust period his heirs will be entitled to succeed to his rights and that in certain instances the heirs may be able to obtain the allotment when the intended allottee dies after filing his application but before receiving final approval.

D. Lands Subject to Allotment

Section 4 of the General Allotment Act as originally passed and as amended provides for allotments "upon any surveyed or unsurveyed lands of the United States not otherwise appropriated." 57/ The present laws provide for maximum allotments of 40 acres of irrigable land, 80 acres of nonirrigable agricultural land or 160 acres of nonirrigable grazing land. The Indian homestead laws contain no specific provisions concerning the quantity or type of land available. They simply provide that Indians shall be entitled to the benefits of the homestead laws. Therefore, the lands that are available to Indians under those laws are the same as those available to all other homesteaders.

In view of the fact that the allotment laws provide for different acreages depending upon the irrigability of the land and its quality, it is impliedly necessary to classify the lands to determine how much can be allotted to any one Indian. In addition to this implied requirement for classification, section 7 of the Taylor Grazing Act 58/ prohibits the disposal, settlement or occupation of public land until after it has been classified and the Classification and Multiple Use Act of 1964 59/ directs the Secretary of the Interior to develop criteria for classifying the public lands and to classify them. These classification laws are covered in detail in Chapter 6, but the regulations for classifying lands for Indian allotments promulgated by the Secretary of the Interior pursuant to those laws are of importance in this chapter. These regulations provide that lands may be classified as suitable for Indian allotments if (1) they are valuable for

56/ 43 C.F.R. sec. 2212.0-6(c)(2) (1968).

57/ 25 U.S.C. secs. 334, 336 (1964).

58/ Act of June 28, 1934, ch. 865, sec. 7, 48 Stat. 1272 (codified as amended at 43 U.S.C. 315f (1964)).

59/ Act of September 19, 1964, secs. 1-8, Pub. L. No. 88-607, 78 Stat. 986 (codified at 43 U.S.C. secs. 1411-1418 (1964)).

agricultural purposes, (ii) they are suitable for a home for an Indian and his family, (iii) the anticipated return from agricultural use of the lands would support the residents, and (iv) there is an adequate water supply. 60/

The Department of the Interior has taken the position that lands required to be classified by section 7 of the Taylor Grazing Act are not subject to Indian allotments or settlement until they have been classified as suitable for such purposes. 61/ The Secretary of the Interior has classified lands as unsuitable for Indian allotments where he has determined that it is not economically feasible to use them for agriculture. In the case of John E. Balmer, 62/ the Secretary stated:

Since the intent of the Indian Allotment Act is provided, in effect, a homestead which will constitute the source of a livelihood for an Indian family, as indicated by the language of the act which allows the different acreages of land suitable for different purposes, it is within the authority of the Secretary of the Interior to determine that 160 acres of grazing land that is incapable of supporting a ranch family is not proper for acquisition in satisfaction of rights acquired by Indians under the Indian Allotment Act. 63/

In a similar case appealed to the courts the applicants for an allotment contended that the Secretary had no right to classify the lands as unsuitable for an Indian allotment and deny their application on the ground that the lands contained poor quality soil. 64/ The applicants cited the regulation that provides that where an Indian makes settlement in good faith upon unreserved lands an allotment cannot be denied on the grounds that the lands are too poor in quality. 65/ However, the court denied the appeal and said that particular regulation applied to settlements on unreserved lands, and the applicants had not settled the lands, and furthermore the lands were not unreserved in that they had been withdrawn for classification pursuant to section 7 of the Taylor Grazing Act. 66/

60/ 43 C.F.R. sec. 2410.1-3(d)(6) (1968).

61/ Alexander Bateman, A-27203 (Interior Dec., November 9, 1955). This position of the Government is presently being contested in the courts in another case (Amos A. Hopkins (Dukes) v. United States, appeal docketed, No. 21456, 9th Cir., Dec. 7, 1966) which, at the time of this writing, is on appeal before the United States Court of Appeals for the Ninth Circuit. This case is discussed more fully in Chapter 6.

62/ 71 I.D. 66 (1964).

63/ Id. at 67-68.

64/ Daniels v. United States, 247 F. Supp. 193 (W.D. Okla. 1965).

65/ 43 C.F.R. sec. 2212.0-7(a)(3) (1968).

66/ See also, Finch v. United States, 387 F.2d 13 (10th Cir. 1967).

In addition to the requirement that the land must first be classified for Indian allotments before it can be entered, there are other requirements affecting its suitability for Indian allotments.

1. The Land Must be Unappropriated

As mentioned earlier the allotment statutes provide that settlement can be made upon lands of the United States not otherwise appropriated. Obviously, if it cannot be shown that the lands belong to the United States an allotment cannot be granted. The Department of the Interior has rejected an application where the Bureau of Land Management records showed that the land was within a Mexican land grant confirmed by patent and there was no evidence submitted that it belonged to the United States. 67/ It has also been held that lands that have been acquired by the United States through purchase or condemnation do not meet the criterion of lands not otherwise appropriated and therefore are not available for Indian allotments. 68/

If lands have been withdrawn for any purpose they are no longer unappropriated and therefore not available for Indian allotments unless otherwise provided by statute. This is the basis for the present requirement that the lands must be classified before they can be available because virtually all Federal land has been withdrawn for classification. This will be discussed more thoroughly in the classification chapter. However, if a prospective allottee can show that he settled upon the lands before they were withdrawn, he is entitled to an allotment if he meets all the other conditions. 69/

The question of the suitability of so called "O&C Lands" for Indian allotment has been considered in a Department of the Interior decision and by the Solicitor. 70/ In a 1956

67/ Anguita L. Klunter, A-30483 (Interior Dec., November 18, 1965).

68/ Lewis v. General Services Administration of the United States, 377 F.2d 499 (9th Cir. 1967); Bobby Lee Moore, 72 I.D. 505 (1965).

69/ Carole Hayward, Sacramento 048366 (B.L.M. Dec., March 25, 1958); Grover C. Sanderson, Sacramento 045861, (B.L.M. Dec., April 21, 1958); John David Smith, A-28829 (Interior Dec., September 17, 1962).

70/ The term "O&C Lands" refers to the revested Oregon and California Railroad grant lands and the reconveyed Coos Bay Wagon Road grant lands in the State of Oregon.

decision the Department assumed, but did not decide, that O&C Lands were suitable for an Indian allotment, but it rejected the application for an allotment on other grounds. 71/ However, in an opinion given in 1966 the Solicitor held that the O&C Lands are appropriated lands within the meaning of the Indian allotment laws and therefore are not subject to Indian allotments. 72/

It has also been held in a rather unusual case that land in California formed out of the sea by alluvium is not public land where none of the abutting upland is public. In this decision defeating the attempt of an enterprising Indian to obtain an allotment, it was held that the accretion had the same status as the land it abutted and that part of the abutting land was patented and the remainder had been withdrawn. 73/

a. Allotments in National Forests

While the general rule is that only unappropriated lands are available for allotments, by act of Congress allotments may be obtained in national forests if the Secretary of Agriculture determines the lands applied for are more valuable for agricultural or grazing purposes than for the timber on it. 74/

National Forest allotments are covered in the Code of Federal Regulations 75/ and in the Forest Service Manual. 76/ If these two authorities are not in actual conflict, they at least present a confusing picture when read together. The 1968 regulations state that the statutory provisions of the act (Forest Allotment Act) permitting allotments in the national forests are:

(N)ot limited to Indians occupying, living on, or having improvements on lands within a national forest at the date of the passage of the act, but apply also to Indians whose settlement, occupations or improvements occurred subsequent to the passage of the act. 77/

71/ John Johnson, A-26823 (Supp.) (Interior Dec., December 18, 1956).

72/ Solicitor's Opinion, M-36697 (October 7, 1966).

73/ Harry H. Van Pelt, A-26717 (Interior Dec., August 17, 1953).

74/ Act of June 25, 1910, ch. 431, sec. 31, 36 Stat. 863 (codified at 25 U.S.C. sec. 337 (1964)).

75/ 43 C.F.R. sec. 2212.2-3 (1968).

76/ U.S. Dept. Agriculture, Forest Service Manual secs. 5482.4 - 5482.43.

77/ 43 C.F.R. sec. 2212.2-3(f) (1968).

The regulations then go on to refer to the Forest Homestead Act of June 11, 1906, 78/ but fail to mention that this act was repealed in 1962. 79/

The Forest Service Manual says that the Forest Allotment Act "is expressly limited in its application to the granting on, or having improvements on National Forest lands." 80/ In other words, according to the manual, the Forest Allotment Act does not grant any right to Indians to enter lands in the future, and as there are no other laws that give them such a right to enter, the manual concludes:

Accordingly, since repeal of the Forest Homestead Act, the Forest Allotment Act is limited in its application to those instances, if any where (1) settlement was made prior to the date of the act (June 25, 1910); or (2) settlement was made after that date on lands opened to settlement under the Forest Homestead Act (repealed October 23, 1962), and the settlement has not been completed through to a formal allotment and patent. 81/

The only way these provisions of the regulations and the manual can be reconciled is to assume that when the regulations say the act applies to settlements which occurred subsequent to the passage of the act it means settlements under the former Forest Homestead Act which have not yet been completed through to allotment and patent. A complete reading of all the regulations and manual provisions covering forest allotments makes it difficult to accept such a reconciliation. It seems more reasonable to conclude that there is a difference of opinion between the Interior and Agriculture departments as to the intent of the Forest Allotment Act. It is interesting to note that section 5482.42 of the Forest Service Manual sets forth section 2212.2-3 of the regulations, except that it omits 43 C.F.R. sec. 2212.2-3(f) quoted above. As the Secretary of Agriculture has to approve all allotments on forest lands, his interpretation of the law probably prevails in most instances.

78/ Ch. 3074, 34 Stat. 233 (formerly codified at 16 U.S.C. secs. 506-508, 509).

79/ Act of October 23, 1962, Pub. L. No. 87-869, sec. 4, 76 Stat. 1157.

80/ Forest Service Manual sec. 5482.41 (October, 1965).

81/ Id.

2. Physical Criteria Applied in Determining the Suitability of Lands for Allotment

The statutes set forth no requirements concerning the quality or physical characteristics the land must have to be suitable for allotments or Indian homesteads, except for the provisions that different acreages can be obtained depending upon whether the land is irrigable, nonirrigable or suitable for grazing. With regard to Indian homesteads, the suitability of the land is to be determined in the same manner as for general homesteads.

Regulations have been issued defining irrigable, nonirrigable and grazing lands and setting forth other criteria. These regulations provide:

(2) Irrigable lands are those susceptible of successful irrigation at a reasonable cost from any known source of water supply; nonirrigable agricultural lands are those upon which agricultural crops can be profitably raised without irrigation; grazing lands are those which can not be profitably devoted to any agricultural use other than grazing.

(3) Where an Indian makes settlement in good faith upon lands not reserved therefrom, an allotment therefor can not be denied on the ground that the lands are too poor in quality. Also, where settlement was made in good faith, the presence of valuable timber does not warrant the rejection of the allotment.

(4) An allotment may be allowed for coal and oil and gas lands, with reservation of the mineral contents to the United States. 82/

As stated in the regulations, the presence of valuable timber does not warrant the rejection of an Indian allotment application. The decisions have held that timbered lands may be allotted to an Indian provided they contain sufficient arable area to support an Indian family and are, considering their location and the habits and subsistence of the Indians, suitable for a home for the allottee. 83/

82/ 43 C.F.R. sec. 2212.0-7(a)(2)-(4) (1968).

83/ Crichton v. Shelton, 33 L.D. 205 (1904). See also Wilbur Martin, Sr., A-25862 (Interior Dec., May 31, 1950); Charley Anderson, 47 L.D. 187 (1919). In the case of Lillian Shermoen, A-28119 (Interior Dec., January 15, 1960), an application for an allotment for grazing land was rejected because the land was forested "with an excellent stand of Douglas fir and an understory of hardwoods and some brush with a very limited amount of forage along Honeydew Creek".

The regulations provided that an allotment may be allowed on coal, oil and gas lands with a reservation of the minerals to the United States. It has been repeatedly stated in the decisions that the fourth section of the General Allotment Act is essentially a settlement law and that it should be interpreted as other settlement laws. Therefore only agricultural and grazing lands are subject to allotment and lands to which the mineral laws apply are not subject to such fourth section allotments. ^{84/} However, allotments can be granted on mineral lands if there are reservations of the mineral rights. ^{85/}

As contrasted to homesteads and desert land laws, which require the land to be surveyed before it can be patented, Indian allotments can be granted for either surveyed or unsurveyed land. If the land is unsurveyed the allotment application must contain a metes and bounds description and the land must be taken in rectangular form, if practicable, and the lines of the land should follow the cardinal points of the compass unless one or more of the boundaries is a stream or other fixed object. Also the application cannot designate narrow strips of land along streams, watercourses or other natural objects. ^{86/} If unsurveyed land is granted to an Indian, the grant must be adjusted to conform to the survey once the land is surveyed. ^{87/}

As to contiguity requirements the regulations provide:

(2) An allotment to a minor child need not be contiguous to that made by the head of a family; but it is required that each allotment made to an individual, whether the head of a family, a single adult, or a minor child, when such allotment embraces more than one legal subdivision, must be composed of contiguous tracts, as in ordinary disposition of the public domain under a settlement law. An additional allotment must be governed by the same rule. ^{88/}

^{84/} Martha Head, 48 L.D. 567, 568 (1922).

^{85/} Clark, Jr. v. Benally, 51 L.D. 91 (1925).

^{86/} 43 C.F.R.sec. 2212.1-4(a)(1) (1968).

^{87/} 25 U.S.C.secs. 334, 336 (1964).

^{88/} 43 C.F.R.sec. 2212.1-4(a)(2) (1968).

The case of Maud Mossman, ^{89/} states that the general rule is that allotment tracts should be contiguous but that exceptions have been made, usually to save allottees their improvements.

E. The Requirements to Obtain An Allotment

1. Settlement Requirements

The one statutory requirement for allotments is that the Indian must make settlement upon the land desired. The statutes do not indicate what constitutes settlement nor for how long the Indian must maintain his settlement to qualify for an allotment. The Indian homestead laws differ in that they make the Indian subject to all the requirements of any homesteader with regard to settlement, cultivation, residency, etc.

The absence of any statutory provisions defining settlement has made it necessary for the Department of the Interior to formulate rules and regulations setting forth settlement requirements. In instructions issued shortly after the turn of the century (1903) concerning the settlement requirements for the General Allotment Act the Department stated:

When the evident purpose of the act is considered, the term "settlement" therein, must inevitably be construed to mean practically the same as it does under the homestead law, where the essential requirement is actual inhabitancy of the land to the exclusion of a home elsewhere. While this is true it would seem to be entirely consistent and just, in examining the acts and determining the intention and good faith of an Indian allottee in this respect, to give proper and reasonable regard to the habits, dispositions and nomadic character of the race, and to allow more leniency in applying and enforcing the rule applicable to the white settler. ^{90/}

Somewhat later in comparing the settlement requirements for Indians with those for white settlers the Secretary said: "Indian settlers . . . are on practically the same footing as white settlers on the public lands. . . . So that the practice, rules, and decisions governing white settlers on the public lands are, with certain reasonable modifications due to the habits, character, and disposition of the race, equally applicable to Indian settlers." ^{91/} These early rules have continued

^{89/} 44 L.D. 391 (1915).

^{90/} Instructions, 32 L.D. 17, 19 (1903).

^{91/} Lacey v. Grondorf, 38 L.D. 553, 555 (1910).

in effect down to today and are included in the present regulations, 92/ which have been followed quite consistently by the Department in its decisions. 93/

Once the Indian has accomplished his settlement, his right to an allotment has been deemed to have vested. Therefore, if he settles upon the land prior to the time that it is withdrawn from entry he can still obtain an allotment despite the withdrawal, whether the withdrawal was by a legislative or executive action. At least that was the opinion of the Solicitor of the Department of the Interior regarding allotment rights on the public domain in San Juan County, Utah, which Congress had closed to further allotments in 1933. 94/ The Solicitor stated that this closure had no application to Indians whose rights to allotments had become equitably vested prior to the enactment of the legislation:

(A) an application by an Indian qualified under the statute and supported by settlement as required by the statute confers upon the applicant an absolute right to allotment and patent. 95/

Of course, until settlement occurs there is no vesting of rights and Congress is free to impose such conditions on the taking of the lands as it sees fit. Congress has imposed conditions with regard to minerals 96/ which require allottees to take their lands subject to a reservation of mineral rights. 97/

92/ "(a) . . . In examining the acts of settlement and determining the intention and good faith of an Indian applicant, due and reasonable consideration should be given to the habits, customs, and nomadic instincts of the race, as well as to the character of the land taken in allotment. (b) While the act contains no specific requirements as to what shall constitute settlement, it is evident that the Indian must definitely assert a claim to the land based upon the reasonable use or occupation thereof consistent with his mode of life and the character of the land and climate." 43 C.F.R. sec.2212.1-2 (1968).

93/ See Charley Anderson, 47 L.D. 187 (1919); Clark, Jr. v. Benally, 51 L.D. 91 (1925).

94/ Act of March 1, 1933, ch. 160, sec. 1, 47 Stat. 1418 (codified at 25 U.S.C. 337a (1964)).

95/ Opinion, 57 I.D. 547, 550-51 (1942).

96/ Act of July 17, 1914, ch. 142, secs. 1-3, 38 Stat. 509 (codified as amended at 30 U.S.C. secs. 121-123 (1964)).

97/ See Clark, Jr. v. Benally (On Rehearing) 51 L.D. 98 (1925).

In early regulations the Department provided that decisions of the Office of Indian Affairs on whether an Indian was a settler would be conclusive so far as the Land Office was concerned. 98/ However, there is nothing in the current regulations indicating that the Bureau of Land Management accords such finality to Office of Indian Affairs' decisions today.

While the Allotment Act and regulations required settlement it should be noted that there is nothing in either the legislation or the regulations requiring an allottee to reside upon, cultivate, or improve the land. 99/ The 1903 instructions quoted above state that settlement requirements for allotments should be construed practically the same as those under the homestead law "where the essential requirement is actual inhabitancy of the land to the exclusion of a home elsewhere". However, this requirement was qualified in those same instructions by the admonition to give reasonable regard to the nomadic character of the Indian race. In several decisions the Secretary of the Interior has held that Indians do not have to become stationary to get an allotment. In the case of Charley Anderson, 100/ the applicant built a small house and established a residence on the land sought for an allotment. However, he did not make his residence there continually but lived up and down the river "as Indians usually do". 101/ The Secretary said under these facts the applicant was entitled to an allotment, stating that: "The law contains no requirement of 'actual residence' on the part of an applicant" 102/ This absence of any requirements that allottees permanently reside upon the land, cultivate it or make improvements, is a substantial difference between the allotment and homestead laws. As indicated in an earlier chapter, the homesteader must cultivate a portion of the land during the second and subsequent years but the Indian need not perform any cultivation.

a. Settlement Requirements for Minors, Wives and Heirs

Although settlement is the one essential requirement which the adult Indian must meet in order to obtain an allotment, settlement is not required on the part of minors or heirs. Again there is nothing in the statutes to indicate that there

98/ Regulations, 22 L.D. 709 (1896).

99/ Sacrestan v. Santa Fe Pacific R.R., 46 L.D. 426 (1918).

100/ 47 L.D. 187 (1919).

101/ Id. at 189.

102/ Id. at 190. See also Clark, Jr. v. Benally, 51 L.D. 91, 97 (1925); Rollandine Ruth Landerger, Rollan D. Landerger, A-29362 (Interior Dec., July 17, 1963).

should be a different requirement in these cases, but the Department in its regulations and decisions has made this distinction. At least as to allotments to minors it would seem obvious that Congress never intended to require settlement, because to do so would mean that the children would have to break away from their parents and take up settlement somewhere else.

The regulations regarding settlement of minors are very brief and explicit. They provide:

No actual settlement is required in case of allotments to minor children under the fourth section, but the actual settlement of the parent or of a person standing in loco parentis on his own public-land allotment will be regarded as the settlement of the minor children. 103/

While there is no settlement requirement for the minor he can obtain an allotment only if his parent has met the settlement requirements for himself. In the case of Oliver C. Keller, 104/ it was held that the minor child of an Indian woman and a white man is entitled to an allotment only where his mother is qualified and files an application in her own right and makes settlement. The decision stated that she alone is authorized to make the application. Her husband's homestead settlement could not be deemed to be her Indian settlement for the purpose of meeting the requirements that the parent make actual settlement before allotments can be given to the minor children.

In those cases where an Indian has made settlement but dies before final approval of his allotment is obtained, his heirs, according to the regulations, can obtain a patent for the allotment without any further use or occupancy on their part. 105/

2. Procedural Requirements for Obtaining an Allotment

Today before an Indian can obtain an allotment he must have the land classified as suitable for that purpose. 106/ In addition to procedural requirements for classification there are others which apply only to Indian allotments.

103/ 43 C.F.R. sec. 2212.0-6(d) (1968).

104/ 44 L.D. 520 (1916).

105/ 43 C.F.R. sec. 2212.0-6(c)(3) (1968).

106/ The classification requirements and procedures are discussed in Chapter 6.

These are contained in Subpart 2212 of Title 43 of the Code of Federal Regulations. They provide that anyone desiring an allotment must file an application, and if the land is not already classified and opened for allotments, he must also file a petition for classification. In addition he must file a certificate from the Bureau of Indian Affairs certifying that he is an Indian entitled to an allotment. 107/ The Indian can make application for this certificate at the Bureau of Indian Affairs where he must furnish information as to his identity and tribal membership. 108/

If the application is for an allotment on unsurveyed lands it must contain a description of the lands by metes and bounds with courses, distances, and references to monuments by which the tract can be readily and accurately ascertained. 109/

When the allotment application is accompanied by the required certificate from the Indian Office and is approved by the authorized officer it operates as a segregation of the land and subsequent applications for that same land will be rejected. 110/

When the manager of the local land office approves an allotment application, he is required to issue a certificate of allotment on a prescribed form. If the applicant is a single person over twenty-one years of age or the head of a family a report must be made as to the character of the applicant's settlement and improvements. A similar report is required on applications filed on behalf of minor children. 111/

If the applicant is seeking an allotment in a national forest, the regulations require that he submit the application to the supervisor of the forest. It is then forwarded to the Secretary of Agriculture for a determination whether the land applied for is more valuable for agricultural or grazing than for timber upon it. If the Secretary of Agriculture decides that the land is chiefly valuable for timber, he is required to inform the Secretary of the Interior of his decision and the Secretary of the Interior in turn will inform the applicant that his application is denied. If the land is found to be chiefly valuable for agriculture or grazing, the Secretary of Agriculture is required to forward the application to the

107/ 43 C.F.R. sec. 2212.1-1 (1968).

108/ 43 C.F.R. sec. 2212.0-6(b) (1968).

109/ 43 C.F.R. sec. 2212.1-4(a)(1) (1968).

110/ 43 C.F.R. sec. 2212.1-3(c) (1968).

111/ 43 C.F.R. sec. 2212.2-1 (1968).

Commissioner of Indian Affairs. If the Commissioner of Indian Affairs approves the application, he transmits it to the Bureau of Land Management for issuance of a trust patent. 112/

After an application for an allotment has been finally approved the regulations provide that the issuance of a trust patent will be suspended for two years from the date of settlement in order to enable the allottee to demonstrate his good faith and intention. 113/ There is no statutory authority for the imposition of this two-year suspension. It is an added restriction imposed by the Secretary on the Indian's right to obtain an allotment. If the Secretary has the authority to impose such conditions the question may be asked whether there is any limit on the time that he can require an allottee to demonstrate his good faith and intentions. Also, there is nothing in the regulations indicating how good faith is to be determined or what acts must be done to demonstrate it.

The Secretary has issued special regulations governing charges and protests against Indian allotments. These are in addition to the general procedural regulations and are contained in section 2212.3 of Title 43 of the Code of Federal Regulations. As contests and procedural matters are being covered in another study only brief mention is made here of these procedural regulations. They provide that third parties are never invited to attack Indian allotments; however, where they claim equitable rights to lands covered by an allotment for which a trust patent has been issued, a hearing can be ordered with the view of recommending to Congress that the patent be cancelled. 114/ The regulations also provide:

Third parties are not privileged to intervene in proceedings to determine whether lands applied for are of the character subject to allotment or as to the right of the Indian to an allotment as this is a matter resting solely in the judgment of the Department. 115/

F. Federal Control Over Allotments And Indian Homesteads After Issuance of Patents

A review of Table 1 on page 211 shows that the first Indian Homestead Act of 1875 restricted the Indian's right

112/ 43 C.F.R. sec. 2212.2-3 (1968).

113/ 43 C.F.R. sec. 2212.2-2(a) (1968).

114/ 43 C.F.R. sec. 2212.3-1(b) (1968).

115/ 43 C.F.R. sec. 2212.3-1(d) (1968).

to alienate his property for five years. The subsequent acts lengthened this period to twenty-five years with the possibility of extension beyond that time by the President of the United States. The acts also changed the restriction from merely a prohibition against alienation to one in which the patent would be held in trust by the United States. In other words during this trust period the Indian would not actually obtain legal title but only an equitable title. This trust feature of Indian homesteads and allotments is perhaps the most significant difference between these laws and the general homestead and desert entry laws.

1. The Statutory Provisions For Trust Patents

The 1875 Indian Homestead Act provides that the title to lands acquired by an Indian shall not be subject to alienation or incumbrance for a period of five years from the date the patent is issued. 116/ The language in the next act shown on Table 1, (page 211) which concerned the Winnebago Indians of Wisconsin, provided that the titles acquired by those Indians would not be subject to alienation "or subject to taxation of any character" for a period of twenty years from the date the patent was issued. 117/

In the second Indian homestead law, passed in 1884, the language was changed from a prohibition against the alienation to one providing for a trust and the time period was lengthened to twenty-five years. The 1884 Act provided:

All patents . . . shall be of the legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or, in case of his decease, of his widow and heirs according to the laws of the State where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever. 118/

116/ 43 U.S.C. sec. 189 (1964).

117/ Act of January 18, 1881, ch. 23, sec. 5, 21 Stat. 317.

118/ 43 U.S.C. sec. 190 (1964).

In the General Allotment Act of 1887, the provisions concerning the issuance of a patent, which are still the law today, are set forth in virtually the same language as that just quoted from the Indian Homestead Act of 1884 with the following exceptions. First, in reference to cases where the Indian dies before the end of the trust period provision is made for the patent to go to his heirs whereas the 1884 Act provides for it go to his "widow and heirs". Second, the 1887 Act added a proviso that the President may in his discretion extend the trust period. Finally, it included the following language:

And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void 119/

2. The Constitutionality of Trust Patents

In addition to inserting requirements for trust patents in the general laws referred to above, Congress also included such provisions in numerous other laws pertaining to allotments on reservations or to particular tribes. The constitutionality of these trust provisions has been litigated in the courts. One of the unsuccessful arguments presented against the trust requirements was that they deprived the Indian, who became a citizen by virtue of his allotment or homestead patent, of his property without due process of law by placing restrictions on his right of alienation. The Supreme Court in the case of Tiger v. Western Investment Co. 120/ held that the trust provisions are constitutional. The court said that the conferring of citizenship did not prevent Congress from continuing to deal with Indian lands. It also said it was for Congress and not the courts to determine when, in the interest of the Indian, government guardianship for him shall cease. As to the question of citizenship and due process the Supreme Court said, quoting from an earlier case: 121/

Citizenship does not carry with it the right on the part of the citizen to dispose of land which he may own in any way that he sees fit without reference to the character of the title by which it is held. The right to sell property is not derived from, and is not dependent upon, citizenship; neither does it detract in the slightest

119/ Act of February 8, 1887, ch. 119, sec. 5, 24 Stat. 389 (codified as amended at 25 U.S.C. sec. 348 (1964)).

120/ 221 U.S. 286 (1911).

121/ Beck v. Flournoy Live Stock Co., 65 F. 30, 35 (8th Cir. 1894).

degree from the dignity or value of citizenship that a person is not possessed of an estate, or, if possessed of an estate, that he is deprived for the time being, of the right to alienate it. 122/

3. The Power to Extend the Trust Period

The General Allotment Act gives the President the power in his discretion to extend the trust period beyond the twenty-five years required for allotments granted under that act. In 1906 Congress passed another Act, which provides:

Prior to the expiration of the trust period of any Indian allottee to whom a trust or other patent containing restrictions upon alienation has been or shall be issued under any law or treaty the President may, in his discretion, continue such restrictions on alienation for such period as he may deem best: Provided, however, That this shall not apply to lands in the former Indian Territory. 123/

Although the language in the 1906 Act referred to the trust period of an Indian "allottee" and made no mention of a homesteader, the question was raised as to whether the Act gave the President the power to extend the trust period for Indian homesteads. The Secretary of the Interior in several administrative decisions said that the term "allottee" as used in the 1906 and other laws applied to Indian homesteaders as well as allottees. He said the Indian homestead and allotment laws were virtually on the same footing and that Congress had recognized the similarity. In other words the Acts were "in pari materia". 124/ In 1930 the Supreme Court agreed with the Secretary and in United States v. Jackson 125/ held that the President was authorized to extend the trust period for Indian homesteads pursuant to the provisions of the 1906 Act.

While there is no longer any question that the President has the authority to extend the trust period over both allotments and homesteads, it is the opinion of the Solicitor of the Department of the Interior that the President must exercise

122/ 221 U.S. at 313.

123/ Act of June 21, 1906, ch. 3504, 34 Stat. 326 (codified at 25 U.S.C. sec. 391 (1964)).

124/ Jim Crow, 32 L.D. 657 (1904); Toss Weaxta, 47 L.D. 574 (1920).

125/ 280 U.S. 183 (1930). For quotation from this decision see pp. 176-77, supra.

this power prior to the expiration of the trust period in order for it to be effective. ^{126/} In that opinion the Solicitor held that if the trust period was not extended by the President prior to its expiration, the jurisdiction of the Secretary of the Interior over the Indian allotment ceased upon the expiration of the trust period and that there was nothing remaining for him to do but the purely ministerial duties of issuing a patent free from trust to the allottee or his heirs.

In 1951 by Executive Order No. 10250 the President delegated to the Secretary of the Interior his authority to extend trust periods on land patents issued to Indians. ^{127/}

4. The Power to End the Trust Period

In 1906, the same year it passed the act relating to the President's authority to extend trust periods, Congress passed an act which permits the Secretary of the Interior in his discretion to end the trust period prior to the time otherwise provided for by law. ^{128/} This law authorizes the Secretary to provide for the issuance of a fee simple patent any time he is satisfied the allottee is capable of managing his own affairs. After such a patent is issued all restrictions as to sale, incumbrance, and taxation of the land are removed, but the land cannot be liable to the satisfaction of any debt contracted prior to the issuing of such a patent. ^{129/}

Thus, Congress gave the President the power to extend the trust period and the Secretary of the Interior the power to end it. The President in turn delegated his authority to the Secretary so he now is able to exercise both powers.

As to the power to extend the trust period, it can be exercised without the consent of the allottee. But the courts have held that the Secretary cannot end the trust period earlier than the time provided by law without the consent of

^{126/} Solicitor's Opinion, 48 L.D. 643 (1922). See Reynolds v. United States, 252 F. 65 (8th Cir. 1918), which holds the President must exercise the power to extend before the end of the trust period in order for it to be effective. However, rev'd on other grounds, 250 U.S. 104 (1919), where the Supreme Court said it did not have to rule on the effectiveness of an extension made after the original trust period expired.

^{127/} Exec. Order No. 10,250, 3 C.F.R. 755 (1949-1953 compilation), 3 U.S.C., sec. 301 (1964).

^{128/} Act of May 8, 1906, ch. 2348, 34 Stat. 182 (codified at 25 U.S.C. sec. 349 (1964)).

^{129/} Id.

the allottee because he has a vested right in the tax exemption benefits which are part of the trust. ^{130/} This right will be discussed more fully in a later section.

5. The Restrictive Features of Trust Patents

The regulations provide that the laws and regulations concerning the sale of allotted lands, the determination of heirs, the issuance of patents in fee, the disposal of trust allotments by will, and the extension of the trust period applicable to allotments on reservations are equally applicable to allotments on the public domain. ^{131/}

The trust period begins to run from the date of the patent. In other words, the allotment is not deemed to have been made until the issuance of the first or trust patent. ^{132/} During the trust period the allottee cannot independently alienate the property in any way. Title may be transferred only pursuant to rules and regulations prescribed by the Secretary of the Interior. Also, any transfer must be approved by the Secretary or his representative. ^{133/}

Although contrary statements can be found in the opinions of the Solicitor, ^{134/} the general rule seems to be that restrictions on alienation of lands imposed by the allotment acts run with the land and are not personal to the allottee and that therefore the removal of such restric-

^{130/} United States v. Benewah County, Idaho, 290 F. 628, 631 (9th Cir. 1923); United States v. Nez Perce County, Idaho, 95 F.2d 238 (9th Cir. 1938); Solicitor's Opinion, M-36184, 61 I.D. 298 (1954).

^{131/} 43 C.F.R. sec. 2212.4 (1968)

^{132/} Klamath Allotments, 38 L.D. 559, 561 (1910); United States v. Reynolds, 250 U.S. 104 (1919).

^{133/} Bailey v. Banister, 200 F.2d 683 (10th Cir. 1952).

^{134/} Compare Solicitor's Opinion, 49 L.D. 348, 352 (1922), stating: "(R)estrictions against alienation on land allotted to Indians are more in the nature of personal disabilities imposed on the Indians rather than covenants running with the land", with a later Solicitor's Opinion, M-36184, 61 I.D. 298, 301 (1954) which says: "(R)estrictions on the alienation of allotted lands are in the nature of covenants running with the land, and are not personal to the allottee."

tions as to other tracts in which the allottee may have an interest. ^{135/} This rule produces an illogical result. It means that as to the property which is free of any restrictions the Indian is deemed to be a competent full-fledged citizen, but as the property still subject to restrictions he is deemed to be an incompetent ward of the United States. Apparently the situation can really get ridiculous if the trust period on the Indian's allotment runs out and he gets a patent in fee and then later inherits an interest in other allotted land. Presumably such an Indian goes from ward, to competent person and back to wardship status all without any judicial proceedings or findings of any kind. ^{136/}

Even though the United States holds allotments in trust and can prevent alienation of any kind, the Solicitor has held that the government's power over the trust lands is not unlimited. In a 1942 opinion he stated that the authority of the Department with respect to the utilization of allotments is a statutory authority, and any exercise of such authority of the Department with respect to the utilization of allotments is a statutory authority, and any exercise of such authority must be justified by some statute. ^{137/} This opinion was given to the Secretary of the Interior when he asked whether by virtue of his classification powers or any other power he could forbid an allottee from planting a crop. What prompted the Secretary's question was that there were allotment grazing lands in the Dakotas and Montana which were considered marginal or submarginal for agricultural purposes. During periods of above average rainfall there were demands to lease these grazing lands for growing wheat. Also, during such periods Indian allottees often broke the sod and planted a crop. As a result of such planting during the wet cycle, severe erosion occurred during the dry cycles and it often requires a decade or more for the native grasses to reestablish themselves on the plowed areas. The Secretary wanted to know what his authority was with regard to denying such requests for leases and controlling the allottees in their use of the land. The Solicitor concluded that the Secretary was under no obligation to approve leases to use allotment land for agricultural purposes, but he could not require an allottee to take any positive action for conservation purposes or forbid him from planting a crop regardless of the effect it might have on the land in future years.

^{135/} Johnson v. United States, 283 F. 954 (8th Cir. 1922).

^{136/} For a more thorough discussion of the general rule see Solicitor's Opinion, M-36184, 61 I.D. 298 (1954).

^{137/} Opinion of the Solicitor, 58 I.D. 103, 110 (1942).

The restrictions against alienation applicable to trust patents have been construed to prevent the allottee from voluntarily relinquishing his allotment without the consent of the Department of the Interior. In other words, the Indian is protected against losing his allotment by any means, even by voluntary relinquishment. ^{138/} The Secretary of the Interior has permitted relinquishment of allotments with his consent when he felt it was in the best interests of the Indian. For instance, in the case of Carrie Radcliffe Renze ^{139/} the Secretary permitted an Indian who had obtained an allotment as a minor to relinquish it when he became of age because the land was so rough, rocky and hilly as to make it practically worthless for any purpose. The Secretary cancelled the trust patent and permitted the allottee to take another allotment from other land.

6. The Tax Exemption Benefits of Trust Patents

The imposition of a trust over the Indian allotment is not without its benefits to the allottee. While it restricts his power of alienation it does have the very real benefit of exempting his land from any taxation. This restriction against taxation was expressly set forth in the Act of January 18, 1881, relating to the Winnebago Indians of Wisconsin and their homestead rights. ^{140/} Section 5 of that act provided that the homestead lands would not be subject to taxation of any character for the period of twenty years. The Indian homestead laws of 1875 and 1884 and the General Allotment Act contained no express language prohibiting the taxation of Indian allotments, but the Act of May 8, 1906, giving the Secretary of the Interior the authority to end a trust upon the lands states that if he does so and issues a patent in fee simple, thereafter all restrictions as to sale, incumbrance "or taxation of said land shall be removed". ^{141/}

In 1903 the Supreme Court held that Indian allotment lands definitely were not subject to assessment or taxation by state or local authorities. This was in the case of

^{138/} Falconer v. Price, 19 L.D. 167, 168 (1894).

^{139/} 43 L.D. 84 (1914).

^{140/} Act of January 18, 1881, ch. 23, 21 Stat. 315.

^{141/} 25 U.S.C. sec. 349 (1964).

United States v. Rickert 142/ in which the court said:

To tax these lands is to tax an instrumentality employed by the United States for the benefit and control of this dependent race, and to accomplish beneficent objects with reference to a race of which this court has said that "from their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power". 143/

In its decision the Supreme Court referred to an opinion of the Attorney General of 1888 on the subject of the taxation of Indian lands. Some of the language used in that opinion to justify the tax-free status of allotment land seems rather archaic today, but the tax exempt status still applies. In his opinion the Attorney General stated:

But Congress has not deemed it safe, in making the Indian a freeholder, to give him at once the same control over the land as other freeholders enjoy

That Congress has power to say that the Indian settler on the public lands in a State or Territory shall not be taxed as to his land or that it shall not be aliened or encumbered in any way, is, I think, clear; for if the Indians, as communities, are under "the paternal superintendence of the Government" . . . or "in a state of pupillage", relying upon its kindness and its power, appealing to it for relief to their wants, and addressing the President as their great father . . . and if the national legislation has tended more and more towards the education and civilization of the Indians and fitting them to be citizens . . . it is not easy to comprehend why the guiding and protecting hand of the Government should be powerless to follow the Indian who has abandoned his tribe and resolved to live in a civilized community. It is true that the Indian who gives up his wild life has taken a great step in the direction of becoming a citizen, but his situation as a member of a civilized community exposes him to danger which call for the fostering care and protection of the

142/ 188 U.S. 432 (1903).

143/ Id. at 437.

Government, without which the attempt to make him a useful citizen must fail necessarily. It is only after a considerable period of probation that he can be educated to understand the dignity and responsibilities that belong to citizenship and the ownership of property, and it is to protect him, while receiving this education, that Congress has placed the above-mentioned restraints upon his property rights . . .

It is plain, then, that the Government must continue its "paternal superintendence" over the individual Indian who has become a freeholder in a State or Territory under the legislation above mentioned, or it should not be the means of introducing into such State or Territory so dangerous an element as the Indian must be who is put in the uncontrolled possession of property before he has got the mastery of the improvidence and instability that characterize him in his wild state. 144/

* * * *

The intention of the act of 1875 being to provide a way for starting the Indian to live in a civilized way and educate him to be a good citizen, it would be a strange thing, indeed, to find that Congress had made its plan for that purpose dependent on the Indian's ability and disposition to pay the taxes assessed on his land. 145/

This exempt status of the allotted land applies not only to taxes but to assessments for municipal improvements made prior to the end of the trust period. 146/ It has also been held that, consistent with the general rule that statutes affecting Indians must be liberally construed, the royalty payments from tribal mineral deposits credited to individual Indians are exempt from Federal income tax. 147/

144/ 19 Op. Att'y Gen. 161, 164-65 (1888).

145/ Id. at 168.

146/ United States v. Southern Surety Co., 9 F.2d 664 (E.D. Okla. 1925).

147/ Big Eagle v. United States, 300 F.2d 765 (Ct. Cl. 1962).

This right to tax exemption during the trust period has been held to be a vested property right which Congress cannot take away from the Indian without his consent, even though Congress can remove the restriction against alienation at any time. ^{148/} Thus, the restrictions against alienation and tax-exempt status of trust property are not necessarily co-existent factors. While the tax-exemption is a vested right, the Indian can waive this right and he does so if he voluntarily applies for and obtains a patent in fee under the Act of May, 1906 permitting the Secretary of the Interior to end a trust period. ^{149/} But if he does not consent to ending the trust period, as stated above, the Secretary cannot force a fee simple patent upon him and deprive him of his tax-exemption rights.

Although the cases have consistently held that the allotment land is free from all taxes, assessments or liens imposed by any taxing entity, in one case a court declared a lien on an allotment. This was for attorney's fees and expenses incurred in successfully proving the Indian's right to an allotment in Palm Springs, California. ^{150/} Conceivably the attorney took the case on a contingent fee. In any event the court authorized a lien against the trust property, which was quite unusual.

G. Summary

The Indian homestead and allotment laws have been characterized as settlement laws and sometimes considered similar to the other settlement laws such as the homestead and desert land entry laws. However, there are some important differences between the Indian settlement laws and the others. First, the rationale for and objectives of the Indian laws were different. The Indian laws based on the theory that the Indian was an uncivilized person who needed the "paternal superintendence of the government". The objectives were to encourage the Indian to give up his tribal affiliation and take up the ways of the civilized white man. The reasons for the homestead or desert land acts and their objectives were obviously different.

Another difference between the Indian and general settlement laws is that the quantity of land provided for Indian allotments is less than that for homesteads or desert land entries. For instance, only 40 acres of irrigable land for an

^{148/} Choate v. Trapp, 224 U.S. 665, 673 (1912). See also United States v. Ferry County, Wash., 24 F. Supp. 399 (E.D. Wash. 1938).

^{149/} See Solicitor's Opinion, 50 L.D. 691 (1924).

^{150/} Arenas v. Preston, 181 F.2d 62 (9th Cir. 1950), cert. denied, 340 U.S. 819 (1950).

allotment as opposed to 160 acres for a general homestead and 320 acres for a desert land entry.

Not all of the differences between these laws are discriminatory against the Indian. The allotment laws provide for allotments to minor children as well as to the adult parents. No similar provisions are contained in the homestead or desert land entry acts. Also, the allotment laws have no requirements concerning cultivation or the making of improvements on the land, and, the requirements concerning settlement are more liberally construed with regard to Indians than others. Another major distinction of the allotment laws is the provisions for trust patents. These may be both a benefit and a detriment to the Indian. They restrict his right to dispose of his property, but along with the trust goes an exemption from taxes on his allotment.

The purposes of the Indian homestead and allotment laws were to encourage Indians to give up their tribal ways and accept civilization. Whether these laws ever succeeded in accomplishing their objective is open to question. In testimony before the House Committee of Indian Affairs in 1934, the Commissioner of Indian Affairs had this to say concerning the success of the allotment laws:

The belief was that when he (the Indian) got a parcel of land he would become ambitious about that parcel of land and would develop increasingly the kind of individualistic ambition about a piece of land held in fee that is common among white people.

All that might have happened if we had allotted the land and if then the Government had completely gotten out of the picture . . .

But we did not do anything of the kind. We allotted them under trust. We proceeded to administer the allotments for them and we would them up under paternalistic restrictions. The very act intended to put them on their feet and make them self-helping and self-governing, developed paternalistic and bureaucratic restrictions under which they lived and so it has gone on until now. ^{151/}

Regardless of the success, or lack of it, of the Indian homestead and allotment laws in the past, these laws appear to

^{151/} Hearings on H.R. 7902 Before the House Committee on Indian Affairs, 73d Cong. 2d Sess., pt. 7, at 33 (1934).

have little effect today. According to the Bureau of Land Management, in 1967 only three Indian allotments totaling 480 acres were given final approval in the continental United States. ^{152/} During that same year only one hundred and sixty acres were classified and found suitable for disposition for Indian allotments. ^{153/} The statistics seem to indicate that the Indian homestead and allotment laws are no longer being used to furnish Indians land off of reservations nor are they having any appreciable effect on the use or disposition of the public domain for intensive agriculture.

^{152/} Bureau of Land Management, Department of the Interior, Public Land Statistics: 1967, Table 15 at 43-45.

^{153/} Id., Table 68 at 120.

Table 1
Comparison of Indians Eligible, Quantities of Land Available
and the Restrictions Against Alienation in the Principal Acts
Providing for Indian Homesteads and Allotments on the Public Domain

Act	Indians Eligible to Receive Land	Quantities of Land Available	Restriction Against Alienation
1. Act of March 3, 1875 18 Stat. 420 43 U.S.C. 189 (Indian Homestead Law)	Non-tribal Indians born in U.S. over 21 years old or heads of a family	Same as provided for general homesteaders - generally 160 acres	Inalienable for <u>5</u> years
2. Act of January 18, 1881 21 Stat. 315 (Winnebago Indians)	Same as above - but act applied only to Winnebago Indians	Same as above	Inalienable for 20 years Every patent to include the restriction on alienation Land to be held in Trust for <u>25</u> years
3. Act of July 4, 1884 23 Stat. 96 43 U.S.C. 190 (Indian Homestead Law)	All Indians to the same extent as citizens of the United States	Same as above	
4. Section 4 of Act of February 8, 1887 24 Stat. 388 25 U.S.C. 334 (General Allotment Act)	Any Indian who settles unappropriated land, and his or her children	For agricultural purposes: Head of family - 1/4 section Single persons over 18 & orphans under 18-1/8 sec. others over 18-1/16 sec. Double allotments for grazing purposes 1/8 section for agricultural purposes and 1/4 section for grazing purposes to all allottees	Land to be held in Trust for 25 years and President authorized to extend Trust period in his discretion
5. Act of February 28, 1891 26 Stat. 795 25 U.S.C. 336 (Amendment & extension of general allotment law)	Same as above		Same as above
6. Act of June 25, 1910 36 Stat. 860 25 U.S.C. 336 (Amendment of sections 1 & 4 of No. 5 above)	Same as above	40 acres of irrigable land 80 acres of nonirrigable agricultural land 160 acres of nonirrigable grazing land All to be in such areas as President may deem proper	Same as above

CHAPTER 5

ACREAGE LIMITATION POLICIES

One common feature which all the present agricultural land laws possess is some form of limitation on the acreage any one person can acquire. The maximum acreage obtainable varies from one type of entry to another. While some people tend to consider the present acreage limitation provisions as inviolable, the fact is that much of the public domain was disposed in large tracts to individuals, corporations and states and Congress has changed the acreage limitations from time to time to meet particular conditions.

When the original Homestead Act of May 20, 1862 ^{1/} was adopted by Congress, it was determined that 160 acres of land would be the maximum individual entitlement. This amount of land, which had been included as the maximum amount obtainable under some of the earlier preemption statutes, was considered adequate to permit a family to sustain itself at a reasonable level. Over the years, however, prompted by pressures from various interest groups and by the diverse nature of the public domain, Congress altered its acreage limitation policies to meet different needs and changing philosophies.

The first step away from the 160 acre limitation occurred in 1877, when Congress adopted the desert land laws. ^{2/} The desert land laws, as originally enacted, permitted the entry and reclamation of up to 640 acres of desert land. Two factors motivated Congress to enact the desert land laws with acreage limitations above those found in the homestead laws. First, it had become apparent that the arid and semiarid regions of the west were not conducive to the same type of settlement and development as midwestern lands which did not require irrigation. To make settlement of these arid regions more attractive, larger acreage was offered to insure settlers a reasonable remuneration for their cultivation efforts. Second, the desert land laws, as contrasted to the homestead laws, were not considered a free grant of land. It was anticipated, and in fact required, that the entryman would expend substantial amounts of money for irrigation and reclamation

^{1/} Act of May 20, 1862, ch. 75, 12 Stat. 392

^{2/} Act of March 3, 1877, ch. 107, 19 Stat. 377.

works. Further, the desert land entryman was required to purchase the land from the government at a price of \$1.25 per acre. Although the sum of \$1.25 per acre seems ridiculously inexpensive today, in 1877 the sum of \$800 (640 acres x \$1.25) could be a substantial deterrent to a settler with limited funds who was also required to expend at least \$3.00 per acre on improvements to reclaim the land in order to qualify for a patent.

The liberal acreage limitation philosophy incorporated in the desert land laws in 1877 lasted only thirteen years. On August 30, 1890, Congress passed an act limiting the total amount of public land that each person could acquire under any or all the Federal land laws to 320 acres. ^{3/} At the time this limitation was adopted only the desert land laws permitted the occupation of more than 320 acres by one person. Therefore, the effect of the 1890 Act was to reduce the acreage limitation provision of the desert land laws from 640 to 320 acres.

Quite often the rationale for increasing or decreasing the maximum acreage obtainable has been the ability of an entryman to sustain a reasonable standard of living upon a given amount of acreage. The Act of August 18, 1894, ^{4/} commonly known as the Carey Act, is a good example of a Congressional decision limiting acreage based upon economic considerations. Under the Carey Act desert land is granted to a state and is partially reclaimed by the state's construction of reclamation works. Since the state is supplying reclamation works, undertaking much of the burden which the individual entryman assumes under the Desert Land Act, and helping change desert land to prime farm land, Congress felt that only 160 acres should be granted to any one individual.

^{3/} Act of August 30, 1890, ch. 837, sec. 1, 26 Stat. 391; (codified as amended at 43 U.S.C. sec. 212 (1964)).

^{4/} Ch. 301, sec. 4, 28 Stat. 422; (codified as amended at 43 U.S.C. sec. 641 et seq. (1964)).

The vacillation that has occurred in acreage limitation policies is amply demonstrated by comparing the Kinkaid Act ^{5/} and the enlarged homestead laws. ^{6/} The Kinkaid Act was adopted to solve a problem which was occurring in Nebraska and other portions of the west with increasing frequency. As the more desirable lands were settled and patented, numerous parcels of the public domain were found to be neither capable of supporting a family on the 160 acres allowed for homesteads nor susceptible of irrigation so as to allow desert land entries. In 1904 Congress attempted to encourage the entry of such lands by enacting the Kinkaid Act which is applicable to nonirrigable arid land in northwestern Nebraska. Although this act was adopted only fourteen years after Congress had decided to limit acquisition of the public land to 320 acres, the Kinkaid Act allowed the occupation, settlement and acquisition of 640 acres.

Within the next five years, however, the trend was apparently reversed again. In 1909 Congress recognized that nonirrigable, arid lands existed in states other than Nebraska. Therefore, it adopted the Enlarged Homestead Act to apply to the States of Montana, Wyoming, Colorado, New Mexico, Arizona, Utah and Nevada. In later years the act was made applicable also to the States of California, Kansas, North Dakota, Oregon, South Dakota and Washington. Although the problems of farming nonirrigable, arid land in these states are similar, if not identical, to the problems met in Nebraska, the enlarged homestead laws permit entry of a maximum of 320 acres.

While the Enlarged Homestead Act did not expressly repeal the 1890 Act limiting the total amount of public land a person can acquire to 320 acres, the decisions have held that the 320 acre limitation of the 1890 Act does not apply to enlarged homestead entries because the enlarged homestead laws were enacted after the 1890 Act. ^{7/} Under certain circumstances a person can obtain more than 320 acres of public

^{5/} Act of April 28, 1904, ch. 1801 secs. 1-3, 33 Stat. 547, 548; (codified as amended at 43 U.S.C. sec. 224 (1964)).

^{6/} Act of February 19, 1909, ch. 160 secs. 1-6, 35 Stat. 639; (codified as amended at 43 U.S.C. sec. 218 (1964)).

^{7/} Marshall F Hopper, 41 L.D. 283 (1912).

lands by taking advantage of the Enlarged Homestead Act in combination with other settlement laws. For instance, anyone owning a desert land entry of 160 acres or less is eligible to make an enlarged homestead entry of up to 320 acres. ^{8/} In this situation the total acreage which can be obtained under the public land laws is 480 acres in spite of the Act of August 30, 1890. Also, if the entryman has obtained title to the maximum amount allowable under the desert land laws, 320 acres, but has sold a portion of his land so that he now holds 160 acres or less he can also make entry under the enlarged homestead laws. In this situation the total acreage that can be obtained is 640 acres, again in spite of the Act of August 30, 1890.

The desert land laws, having been enacted in 1877, are limited by the Act of August 30, 1890. Therefore, until Congress adopted a modifying statute, the converse situation to that described above did not exist. A person who had made an enlarged homestead entry of 320 acres could not later make a desert land entry because anyone who had obtained title to 320 acres of public land was ineligible to make a desert land entry. As was stated in the case of Marshall F. Hopper, ^{9/} the Act of August 30, 1890, in its application to the qualifications of desert land entrymen, was not changed by the passage of the enlarged homestead laws.

To remedy the inconsistency of one being able to make a desert entry followed by an enlarged homestead entry thereby obtaining title to more than 320 acres, but not being able to do the reverse, Congress passed the Act of February 27, 1917, which states:

The right to make a desert-land entry shall not be denied to any applicant therefor who has already made an enlarged homestead entry of three hundred and twenty acres: Provided, That said applicant is a duly qualified entryman and the whole area to be acquired as

^{8/} Section 161, which establishes the requirements for general and enlarged homestead entrymen, bars only those who have made previous homestead entries or currently own more than 160 acres of other land. Therefore, anyone holding a desert land entry of 160 acres or less can make an entry of 320 acres under the enlarged homestead laws.

^{9/} 41 L.D. 283 (1912).

an enlarged homestead entry and under the provisions of this section does not exceed four hundred and eighty acres. ^{10/}

Thus, the unusual situation created by the combination of the enlarged homestead laws and the 1890 acreage limitation provision forced Congress to make an express exception to the 320 acre limitation, by allowing a combination enlarged homestead-desert land entry not to exceed 480 acres.

Finally, in 1934, Congress passed the Taylor Grazing Act ^{11/} which includes the latest policy statement on acreage limitations. Section 315 (f) states that homestead entries shall not be allowed for tracts that exceed 320 acres. At the time of its passage only one of the homestead laws allowed entries of greater than 320 acres. This was the Kinkaid Act which applied only to portions of Nebraska. By implication, therefore, section 315 (f) amended the Kinkaid Act so as to limit entries thereunder to 320 acres. However, the language of section 315 (f) is not entirely clear. Although it prohibits entries of tracts exceeding 320 acres, it does not state whether more than one tract can be entered. ^{12/}

Several other Congressional acts establishing acreage limitations should be mentioned. One of these is the Reclamation Act passed in 1902 which provided for reclamation homesteads. ^{13/} In the Reclamation Act, Congress set a maximum limitation of 160 irrigable acres for reclamation homesteads, but it also gave the Secretary of the Interior the authority to limit entries to a lesser amount. ^{14/} After a reclamation project is constructed, the Secretary establishes "farm units" which can range from 10 to 160 acres and these become the maximum amounts that can be entered by one

^{10/} Ch. 134, 39 Stat. 946; (codified at 43 U.S.C. sec. 330 (1964)).

^{11/} Act of June 28, 1934, ch. 865, 48 Stat. 1269 (codified as amended at 43 U.S.C. sec. 315 et seq. (1964)).

^{12/} See discussion of this problem Chapter 2, p. 90.

^{13/} Act of June 17, 1902, ch. 1093, 32 Stat. 388; (codified as amended at 43 U.S.C. sec. 371 et seq. (1964)).

^{14/} 43 U.S.C. secs. 434, 451h (1964).

person. The size of the farm unit is based upon the sufficiency of each unit to support a family and to repay to the reclamation fund the charges apportioned to the land. Thus, the acreage granted can be substantially less than 160 acres if the Secretary determines that less than that amount is required to support a family. It should be noted that this is the only statute which provides administrative flexibility in establishing acreage limitations. Under all other statutes, the entryman alone has the power to determine the acreage to be entered up to the statutory maximum.

Another act establishing acreage limitation was the Pittman Underground Water Act. ^{15/} This act, which was applicable only to the State of Nevada authorized the Secretary of the Interior to grant permits to citizens to explore for water beneath tracts of public lands of up to 2,560 acres. If the permittee discovered sufficient water to produce profitable agricultural crops he could get a patent of up to one-fourth the land covered by his permit. Thus he could get a patent for as much as 640 acres. This was another exception to the 320 acre limitation in the Act of August 30, 1890. However, in 1964 the Pittman Act was repealed. ^{16/}

The Indian allotment laws, discussed in Chapter 4, also contain acreage limitations. The present allotment laws provide for maximums of 40 acres of irrigable land, 80 acres of nonirrigable agricultural land or 160 acres of grazing land. These limitations have changed through the years, as shown by Table 1 on page 211. Also, under the allotment laws, an Indian can obtain allotments for his children. Thus, the allotment to a family containing many children can theoretically be substantially greater than the amount of land an entryman could obtain under any other land laws.

Table 2 on page 220 shows the maximum acreage permitted under the laws discussed in this chapter. It shows that there is a variety of different limitations. Most of these differences came about historically because of a recognition of different geographical conditions. The table also shows that there have been no statutes enlarging acreage limitations enacted for over 50 years, despite great changes in farm technology and in the average size of farms.

^{15/} Act of October 22, 1919, ch. 77, 41 Stat. 294.

^{16/} Act of August 11, 1964, Pub. L. No. 88-417, sec. 1, 78 Stat. 389.

Several devices have been used legitimately to avoid some of the effects of these acreage limitation provisions. Perhaps the most common is to have both a husband and wife apply for land. This is often done in the case of desert land entries as there are no residence requirements. By having both spouses file for entries a total of 640 acres can be obtained. This cannot be done in the case of homesteads because the homesteader has to reside on his entry. At least it cannot be done without having to build two residences.

Another way in which large farms have been established despite the acreage limitations is by having adult children file for entries adjacent to those of their parents. Any patent issued is in the name of the child, but as long as there is family harmony this method does allow the accumulation by families of quantities of land substantially in excess of the amount an individual can obtain. In the case of Indians, allotments can be had for all members of the family. Thus, if the family is large enough it is possible, at least in theory, to obtain a huge family farm.

Attempts have been made to use several other devices such as long term leases and mortgage agreements to obtain greater acreage than that permitted by law. These devices generally have not been accepted by the Department and have been successfully resisted in cases such as the Indians Hill decision discussed at length in the desert land chapter. ^{17/}

In conclusion, the acreage limitations are, as shown in Table 2, numerous and varied. Further, they do not provide for substantial administrative flexibility in their application. Only the reclamation homestead laws expressly give the administrator any power over the acreage to be entered. ^{18/} By administrative decision it has been held that one who acquires more than 160 acres of community property in a community property state is not the proprietor of more than 160 acres within the meaning of the homestead laws if his undivided interest in such property does not exceed that amount. ^{19/}

^{17/} See pp. 154-65 supra.

^{18/} See pp. 92-4 and 216-17, supra.

^{19/} Thomas H. P. Glaspie, 53 I.D. 577 (1932); See p. 15, supra.

Although throughout the legislative history of the agricultural land laws, the acreage limitations have been altered many times to meet changing conditions, few statutes have expressly waived acreage limitations in specific situations. The major example of such Congressional action is section 330, discussed in Chapter 3 and earlier in this chapter,^{20/} which provides that a combination enlarged homestead-desert land entry may be made not to exceed 480 acres.

Finally, as was noted earlier, in order to avoid the acreage limitation restrictions and lack of administrative flexibility, entrymen have used such devices as ownership by husband and wife and adult children to obtain greater acreage. Such devices have been closely scrutinized by the Department of the Interior to insure that such multiple ownership is not a disguise for single ownership of greater acreage than that allowed by law. Particularly with regard to leases and mortgages as previously discussed regarding the Indian Hill desert land entries in Idaho, devices to increase ownership beyond the statutory limits may result in disastrous consequences such as the cancellation of entries and the accompanying loss of improvements previously placed upon the cancelled entry.

^{20/} See pp. 120 and 214-6, supra.

TABLE 2
Comparison of Acreage Limitations Provisions
of Various Agricultural Public Land Laws

Date & Statute	Maximum Acreage	Land Affected & Special Provisions
1862-Homestead Act	160 acres	Homestead entries. Land free
1877-Desert Land Act	640 "	Arid lands. Entrymen required to pay \$1.25 per acre. Husband & wife each able to make an entry.
1890-Act of August 30	320 "	Reduced total amount of land obtainable under any or all Federal settlement laws, including desert land laws, from 640 to 320 acres.
1894-Carey Act	160 "	Arid lands given to States upon which States constructed reclamation works.
1902-Reclamation Act (Reclamation Homesteads)	160 " (or less)	Reclamation project lands. Permits Sec. of the Int. to reduce maximum below 160 acres.
1904-Kinkaid Act	640 acres	Homesteads in northwestern Nebraska.
1909-Enlarged Homestead Act	320 "	Enlarged homesteads.
1910-Indian Allotment Law Amendments	40, 80 or 160 acres*	Any lands off of reservations.
1916-Stock Raising Homestead Act	640 acres	Homesteads for grazing and raising livestock only.
1917-Act of February 27	480 "	Permits combination desert land and enlarged homestead entries of up to 480 acres.
1919-Pittman Act	640 "	Nevada only - Repealed in 1964.
1934-Taylor Grazing Act	320 "	Homestead entries. Reduced maximum allowed under Kinkaid Act.

*40 acres of irrigable lands, 80 acres of nonirrigable agricultural lands, or 160 acres of grazing lands.

THE CLASSIFICATION LAWS AND THEIR EFFECT ON DISPOSAL
OF LAND FOR AGRICULTURAL USEA. Introduction

The Government's long maintenance of a **policy** of rapid, large-scale disposal of the public lands has never been a guarantee to citizens of a continuance thereof nor can it preclude the Government from modifying or even reversing that policy at will. 1/

Not until the lands in these States [the 24 states covered by Executive Orders No. 6910 and 6964] are restored to the public domain pursuant to section 7 of that act [Taylor Grazing Act] do they become unappropriated lands, subject to entry under the disposal statute applicable to the classification assigned to them. 2/

Classification under section 7 is a prerequisite to the approval of all entries, . . . [for homesteads, desert land entries and Indian allotments.] 3/

As indicated by these quotations, Federal land can no longer be entered and acquired as easily as it once was. Today the land first must be classified as valuable or suitable for agricultural purposes before it can be opened to homesteads, desert land entries or Indian allotments. With classification as a prerequisite to entry one might ask why this chapter on classification does not precede the chapters on the disposal laws. Such an arrangement was possible, but it was felt that an explanation of the disposal laws would make it easier to understand the reasons classification laws were adopted and their objectives.

Historically the homestead, desert land and other disposal laws are much older than the classification statutes. The experience gained from these older laws, plus technological and scientific developments in agricultural production,

1/ George J. Propp, 56 I.D. 347, 350 (1938).

2/ David B. Morgan, 60 I.D. 266, 270 (1948).

3/ 43 C.F.R. sec. 2410.0-3(a) (1968).

the diminution in the amount of prime agricultural land left for disposal, and the increase in importance of other uses for public lands all created pressures over the years for classifying the remaining Federal lands before opening them for disposal.

While the strong emphasis on the need for classifying all Federal land is fairly recent in origin, some classification has been occurring occasionally almost since the passage of the first homestead laws in 1862. For instance, the old Land Department had to determine such things as whether or not lands were mineral in character in order to decide whether they were available for homesteading. Another form of classification is that provided for in section 220 which requires the Secretary of the Interior to determine whether lands are subject to entry for enlarged homesteads. These early classification activities were generally limited in two respects. First, they were usually limited to an "either-or" type of decision - i.e., either the land involved was mineral or not. In other words, the classifier was not free to choose which of many possibilities was the highest and best use of the land. Second, the classification activity was generally limited to small, specific parcels of land. There was no authority to classify all of the public domain.

This lack of clear authority to classify Federal lands before making them available for disposal was considered a weakness in the land laws as far back as 1877. In that year Commissioner J. A. Williamson of the General Land Office informed Congress of the need for land classification and the reservation of certain land from homestead entry. In the 1877 annual report of the General Land Office he stated, "I recommend that the homestead and preemption laws be so amended as to be applicable only to arable agricultural lands, and in no case to lands chiefly valuable for the timber growing upon it." ^{4/}

The pressures for classification continued to grow and gradually laws were passed and regulations adopted bringing about the present situation in which it is necessary for lands to be classified as suitable for agricultural uses before they can be opened to entry and disposition under the homestead and related laws.

B. The Statutory Authority For Classification

The Constitution gives Congress the "Power to dispose of and make all needful Rules and Regulations respecting the territory or other Property belonging to the United States; . . ." ^{5/} This power, including the power to make

^{4/} Commissioner of the General Land Office, Land Reports, at 35 (November 1, 1877).

^{5/} U.S. Const. art. IV, §3, cl. 2.

needful classification of United States territory before determining whether to dispose of it, has often been delegated to the Executive branch of government.

The early delegations of authority to classify public lands were more often implied than expressed. The original Homestead Act permitted entry of the unappropriated public lands. A few years after its passage, the Act of June 21, 1866, ^{6/} which provided that mineral lands were not open to entry for homesteads, was adopted. By implication someone had to have the authority to determine whether lands were mineral. In 1879 Congress established the office of Director of Geological Survey and gave the director the duty to classify public lands and examine "the geological structure, mineral resources, and products of the national domain." ^{7/} While the language of the Act of 1879 might have been interpreted as requiring complete classification of all public lands as to their suitability for use, it was not so interpreted in practice. In fact, it was not until many years later and further congressional action that the Executive Department began to assert the authority to make large scale classifications of public lands.

1. The Pickett Act

In 1910 Congress adopted the Pickett Act ^{8/} which provides in Section 1:

[T]he President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress. ^{9/}

No large scale withdrawals for classification were made pursuant to the Pickett Act until after the adoption of the next major statute relating to classification, the Taylor Grazing Act.

^{6/} Ch. 127, §1, 14 Stat. 67 (codified at 43 U.S.C. §201 (1964)).

^{7/} Act of March 3, 1879, ch. 182, §1, 20 Stat. 394 (codified at 43 U.S.C. §31(a) (1964)).

^{8/} Act of June 25, 1910, ch. 421, §§1-3, 36 Stat. 847 (codified at 43 U.S.C. §§141-143 (1964) (§143 repealed 1960)).

^{9/} Id. at §1 (codified at 43 U.S.C. §141(1964)) (emphasis added).

2. The Taylor Grazing Act

The Taylor Grazing Act, which was adopted in 1934, ^{10/} authorized the Secretary of the Interior, in order to promote the highest use of the public land pending its final disposal, to establish grazing districts covering 80,000,000 acres of vacant, unappropriated and unreserved public domain land. Section 7 of the original Act permitted, and in some cases required, the Secretary to examine and classify lands within grazing districts as to their suitability for the production of agricultural crops. Section 7 as originally adopted provided:

That the Secretary is hereby authorized in his discretion, to examine and classify any lands within such grazing districts which are more valuable and suitable for the production of agricultural crops than native grasses and forage plants, and to open such lands to homestead entry in tracts not exceeding three hundred and twenty acres in area. Such lands shall not be subject to settlement or occupation as homesteads until after same have been classified and opened to entry after notice to the permittee by the Secretary of the Interior, and the lands shall remain a part of the grazing district until patents are issued therefor, the homesteader to be, after his entry, is allowed, entitled to the possession and use thereof: Provided, That upon the application of any person qualified to make homestead entry under the public land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract not exceeding three hundred and twenty acres in any grazing district to be classified, and such application shall entitle the applicant to a preference right to enter such lands when opened to entry as herein provided. ^{11/}

After the passage of the Taylor Grazing Act the President of the United States issued two executive orders withdrawing virtually all of the vacant, unreserved and unappropriated public lands and reserving them for classi-

^{10/} Act of June 28, 1934, ch. 865, 48 Stat. 1269 (codified as amended at 43 U.S.C. §315 et seq. (1964)).

^{11/} Act of June 28, 1934, ch. 865, §7, 48 Stat. 1272 (codified as amended at 43 U.S.C. §315f (1964)).

fication. The first of these was Executive Order No. 6910, ^{12/} issued November 26, 1934. This order, which was issued pursuant to the authority granted in the Pickett Act and in consideration of the provisions of the Taylor Grazing Act required:

[T]hat all of the vacant, unreserved and unappropriated public land in the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah and Wyoming be, and it hereby is, temporarily withdrawn from settlement, location, sale or entry, and reserved for classification, and pending determination of the most useful purpose to which such land may be put in consideration of the provisions of said act of June 28, 1934 [Taylor Grazing Act], and for conservation and development of natural resources. ^{13/}

The second executive order completing the withdrawal of virtually all public lands was No. 6964, ^{14/} issued February 5, 1935. It too was issued under authority of the Pickett Act, but it made no reference to the Taylor Grazing Act because the states affected contained little or no public land suitable for grazing districts. It did refer to the National Industrial Recovery Act. ^{15/} Executive Order No. 6964 ordered:

[T]hat all the public lands in the States of Alabama, Arkansas, Florida, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, Oklahoma, Washington, and Wisconsin be, and they are hereby, temporarily withdrawn from settlement, location, sale, or entry, and reserved for classification and pending determination of the most useful purposes to which said lands may be put in furtherance of said Land Program, and for the conservation and development of natural resources. ^{16/}

^{12/} 54 I.D. 539 (1934).

^{13/} Id. at 539-40. The full text of the order is set forth in Appendix D, page D-2.

^{14/} 55 I.D. 188 (1935).

^{15/} Act of June 16, 1933, ch. 90, 48 Stat. 195.

^{16/} 55 I.D. at 189. The full text of the order is set forth in Appendix D, page D-4.

At the next session of Congress after the issuance of these two executive orders section 7 of the Taylor Grazing Act was amended to give recognition to them and broaden the authority of the Secretary of the Interior to classify lands. The amended version of section 7 adopted in 1936, which is still the law today, sets forth the Secretary's authority to examine and classify lands as follows:

That the Secretary of the Interior is hereby authorized, in his discretion, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this Act, or proper for acquisition in satisfaction of any outstanding lieu, exchange or scrip rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, except that homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry: Provided, That locations and entries under the mining laws, . . . may be made upon such withdrawn and reserved areas without regard to classification and without restrictions or limitation by any provision of this Act. . . . The applicant, after his entry, selection, or location is allowed, shall be entitled to the possession and use of such lands: Provided, That upon the application of any applicant qualified to make entry, selection, or location, under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract to be classified, and such application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to enter, select, or locate such lands if opened to entry as herein provided. ^{17/}

^{17/} Act of June 26, 1936, ch. 842, §2, 49 Stat. 1976 (codified at 43 U.S.C. §315f (1964)).

This amended version of section 7 of the Taylor Grazing Act is the foundation for the Secretary's present authority to classify lands. This will be seen more fully later in this chapter.

3. The Authority to Classify "O&C" Lands.

After the amendment to section 7 of the Taylor Grazing Act, the next Congressional act to broaden the Secretary of the Interior's authority to classify lands was the Act of August 28, 1937. ^{18/} That act authorizes the Secretary to classify, either on application or otherwise, and to restore to homestead entry or purchase any of the revested or conveyed Oregon and California Railroad and Coos Bay Wagon Road grant lands which, in his judgment, are more suitable for agricultural use than for afforestation, reforestation, stream flow protection, recreation or other public purposes. It also provides that any lands heretofore classified as agricultural may be reclassified as timber lands.

4. The Classification and Multiple Use Act of 1964

The 88th Congress enacted 3 major bills affecting the use and disposition of public lands. The first of these created the Public Land Law Review Commission. ^{19/} The second act was the Classification and Multiple Use Act of September 19, 1964, ^{20/} and the third was the Public Land Sale Act of that same date. ^{21/} All three of these acts are intended to be interim measures according to their texts.

It is the Classification and Multiple Use Act with which we are most concerned in this chapter. For reference purposes the complete text of the Act has been set forth in the Appendix ^{22/} The first sentence in section 1 and section 6 ^{23/} show the relationship of the Act to the Taylor Grazing Act. Section 1 says that, "(C)onsistent with and supplemental to the Taylor Grazing Act. . . ." the Secretary shall do certain things. Section 6 states that the Act shall not be construed as to repeal, in whole or in part, any existing law. The fact that Congress did not intend in the Classification and Multiple Use Act to abolish existing laws or

^{18/} Ch. 876, sec. 3, 50 Stat. 875 (codified at 43 U.S.C. sec. 1181c (1964)).

^{19/} Act of September 19, 1964, Pub. L. No. 88-606, 78 Stat. 982 (codified at 43 U.S.C. secs. 1391-1400 (1964)).

^{20/} Pub. L. No. 88-607, 78 Stat. 986 (codified at 43 U.S.C. secs. 1411-18 (1964)).

^{21/} Act of September 19, 1964, Pub. L. No. 88-608, 78 Stat. 988 (codified at 43 U.S.C. secs. 1421-27 (1964)).

^{22/} Appendix D, page D-6, et seq.

^{23/} 43 U.S.C. secs. 1411, 1416 (1964).

delegate great increases in authority to the Secretary of the Interior is further shown by the Congressional reports on H. R. 5159, the bill which became the classification act. The Senate report states:

H. R. 5159 is designed to provide in one central act a basic authority for the management and disposal of the public lands administered by the Bureau of Land Management in the Department of the Interior.

Presently, most of the authorities set forth in this act are in existence, but an orderly procedure for their coordinated implementation is not contained in existing law.

The concept of multiple-use management of publicly held resources is not new. It has long been applied to the public lands and was envisioned in the enactment of the Taylor Grazing Act of 1934.^{24/}

Section 1 of the Classification Act requires that:

Consistent with and supplemental to the Taylor Grazing Act of June 28, 1934, as amended, and pending the implementation of the recommendations to be made by the Public Land Law Review Commission —

(a) The Secretary of the Interior shall develop and promulgate regulations containing criteria by which he will determine which of the public lands and other Federal lands, including those situated in the State of Alaska exclusively administered by him through the Bureau of Land Management shall be (a) disposed of because they are (1) required for the orderly growth and development of a community or (2) are chiefly valuable for residential, commercial, agricultural (exclusive of lands chiefly valuable for grazing and raising forage crops), industrial, or public uses or development or (b) retained, at least during this period, in Federal owner-

^{24/} S. Rep. No. 1506 and H.R. Rep. No. 1243, 88th Cong., 2nd Sess. (1964); 1964 U.S. Code Cong. and Adm. News 3756.

ship and managed for (1) domestic livestock grazing, (2) fish and wildlife development and utilization, (3) industrial development, (4) mineral production, (5) occupancy, (6) outdoor recreation, (7) timber production, (8) watershed protection, (9) wilderness preservation, or (10) preservation of public values that would be lost if the land passed from Federal ownership. ^{25/}

Paragraph (b) of section 1 provides that the Secretary shall:

(A)s soon as possible, review the public lands as defined herein, in the light of the criteria contained in the regulations issued with this section to determine which lands shall be classified as suitable for disposal and which lands he considers to contain such values as to make them more suitable for retention in Federal ownership for interim management under the principles enunciated in this section. ^{26/}

In making these determinations the Secretary is to give due consideration to all pertinent factors including ecology, priorities of use, and the relative values of the various resources in the particular areas. Section 1 also states that no land subject to the act will be given a classification or designation other than one that is authorized by statute or regulation.

It should be noted that section 1 (a) includes lands chiefly valuable for agricultural uses with those to be considered for disposal. Agriculture is not included as one of the purposes for which lands may be considered for retention and management. This raises the question of whether the act permits the retention and management of lands for agricultural purposes.

Section 3 of the Act requires the Secretary to:

(D)evelop and administer for multiple use and sustained yield of the several products and services obtainable therefrom those public lands that are determined to be suitable for interim management in accordance with regulations promulgated pursuant to this subchapter. ^{27/}

^{25/} 43 U.S.C. sec.1411 (1964).

^{26/} Id.

^{27/} 43 U.S.C. sec.1413 (1964).

"Multiple Use" is defined in the Act as follows:

"Multiple use" means the management of the various surface and subsurface resources so that they are utilized in the combination that will best meet the present and future needs of the American people; the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output. 28/

This definition of multiple use, which is extremely broad, would seem to permit lands that are classified for retention to be managed for agricultural purposes as well as for any other purpose. If lands are suitable for agricultural use, the language of the Act indicates that the test to determine whether the land should be classified for disposal or retention is whether it is chiefly valuable for agriculture. If it is chiefly valuable for such use, the Secretary is apparently required to classify it for disposal. If the land is not chiefly valuable for agriculture, or one of the other uses requiring classification for disposal, but has secondary value for such use, the Secretary can apparently classify the land for retention and then under the multiple use concept put it to use for agriculture as well as other purposes. The intent of Congress that lands chiefly valuable for agricultural use be disposed of instead of retained and managed is further evidenced in the Public Land Sale Act of 1964 which is discussed in the next section.

The 1964 Classification Act also prescribes certain procedural requirements which the Secretary must follow in exercising his authority under the Act. Before any proposed

28/ 43 U.S.C. sec.1415 (1964).

regulation authorized by the Act becomes effective the Secretary must hold a public hearing and give notice of such hearings to the President of the Senate and the Speaker of the House of Representatives and through publication in the Federal Register. 29/

If the Secretary proposes to classify a tract of land in excess of 2,560 acres he must give notice by publication at least sixty days in advance. 30/ The publication of such a notice of a proposed classification has the effect of segregating the land involved from settlement, location, sale, selection, entry, lease, or other formal disposal under the public land laws except to the extent that the proposed classification or notice thereof specifies that the land shall remain open for one or more forms of disposal. 31/ Such segregation continues in effect for two years from the date of publication unless classification is completed before then or unless the Secretary terminates the segregation. Under certain circumstances the segregation may be continued for a second two year period. 32/

Section 5 of the Act 33/ defines the term "public lands" as used in the Act to mean those lands withdrawn by Executive Orders No. 6910 and No. 6964, lands within a grazing district established pursuant to the Taylor Grazing Act and lands in Alaska, which are not otherwise withdrawn or reserved for Federal use or purpose. Thus, the lands covered by the Act are the same as those in section 7 of the Taylor Grazing Act, except for the addition of Alaskan lands.

5. The Public Land Sale Act of 1964

The Public Land Sale Act of September 19, 1964, 34/ does not affect classification directly, but it does give

29/ 43 U.S.C. sec.1411(a) (1964).

30/ 43 U.S.C. sec.1412 (1964).

31/ 43 U.S.C. sec.1414 (1964).

32/ Id.

33/ 43 U.S.C. sec.1415(a) (1964).

34/ Pub. L. No. 88-608, 78 Stat. 988 (codified at 43 U.S.C. secs 1421-27 (1964)).

further evidence of the intent of Congress that lands classified as chiefly valuable for agricultural use be disposed of. Section 1 of the Act provides in part that the Secretary:

(I)s authorized and directed to dispose of public lands that have been classified for disposal in accordance with a determination that . . . (b) the lands are chiefly valuable for residential, commercial, agricultural (exclusive of lands chiefly valuable for grazing and raising forage crops), industrial, or public uses or development. 35/

Thus, it seems quite clear that if lands are found to be chiefly valuable for agricultural use, the Secretary must dispose of them. However, as will be seen later in this chapter, the Secretary has wide discretion in classifying lands and if he determines that any land should be retained for one or more purposes it would be difficult, if not impossible, to show that the lands were chiefly valuable for agricultural use as opposed to the purposes for which the Secretary decided to retain them.

Congress was aware of the possibility that the Secretary of the Interior might fail to classify agricultural lands for disposal when it considered the legislation establishing the Public Land Law Review Commission. This is evidenced by the Senate report on that legislation which said that the hearings demonstrated several problem areas.

The principle difficulty is the failure of Congress to provide for the Secretary of the Interior legislative guidelines by which the executive department can make determinations between competing demands for the same piece of land. The fact of the matter is that, although there is no general statute permitting retention of lands, a Secretary of the Interior so oriented could, by the failure to classify lands as suitable for disposition, provide for their retention. 36/

The language in the 1964 classification and land sale acts makes it quite clear that Congress intends lands chiefly valuable for agriculture to be disposed of and not retained.

35/ 43 U.S.C. sec.1421 (1964) (emphasis added).

36/ S.Rep. No. 1471, 88th Cong., 2nd Sess. (1964); 1964 U.S. Code Cong. and Adm. News 3743.

The question is whether the phrase "chiefly valuable" is broad enough to permit the exercise of the amount of discretion Congress intends the Secretary of the Interior to have and yet not so broad as to permit a Secretary, who is inclined to do so, to retain valuable agricultural land in Federal ownership.

C. The Regulations, Policies and Rules Issued by the Secretary and Department of the Interior

Pursuant to the authority, expressed or implied, in the various statutes, the Secretary has promulgated regulations governing land classification by the Department of the Interior. Provisions relating to classification have also been adopted by the Bureau of Land Management in its manual, and from time to time the Secretary of the Interior has issued policy statements bearing on classification and disposal of lands. These administrative pronouncements are the guides which are to be followed by the proper officials in making their classifications of the Federal lands.

1. Policy Statements by the Secretary of the Interior Affecting Classification

In 1961 Secretary of the Interior Stewart L. Udall issued two policy statements on land conservation which directly concerned disposal of public lands for agricultural use. On February 14, 1961, he announced a public land conservation policy, the cornerstone of which is that the primary criterion for the Bureau of Land Management in considering transfers of land out of Federal ownership shall be "the public interest." 37/

The Department release of the Secretary's statement stated:

(L)ands which cannot properly be developed under existing public land laws will be retained in Federal ownership until the necessary laws can be enacted. The Department will no longer continue to try to force present-day land needs into the unworkable straightjacket of out-dated laws. . . .

The policy statement also bars marginal agricultural developments on public lands by forbidding agricultural classifications under the land laws when the lands are more valuable for other uses or when such classifications would not be consistent with national agricultural policy.

37/ B.L.M. Manual, Vol. V, Part 1, Ch. 1.20, Appendix III, at 6 (September 5, 1961).

In addition, the land conservation policy statement affirms the Department's position that "The Government must receive a full return for its property in terms of money or other values. No party to a transaction with the Government should receive a wind-fall". 38/

The Secretary indicated that this policy was aimed at preventing speculation and that he had directed the Director of the Bureau of Land Management to set up procedures to ensure that the government would receive full value for public lands. The Secretary is quoted as saying:

(D)isposition or lease of public lands made pursuant to the public land laws must meet the test of serving the public interest. 39/

There does not appear to have been any statutory authority in 1961 for the Secretary's pronouncement that "The Government must receive a full return for its property in terms of money or other values." The homestead law granting free land had been on the books ninety-nine years when the Secretary issued this statement and had apparently withstood the test of constitutionality. In passing the Taylor Grazing Act Congress did not indicate any intent to repeal the homestead laws or put an end to free land. Therefore, it is difficult to determine upon what authority the Secretary acted in when he said the Government must receive a full return for its property. 40/

On September 24, 1961, Secretary Udall issued a "Conservation Policy for the National Reserve" aimed at giving protection for farmers and water users on or near public lands and to assure that the programs of the Department encouraged water conservation and did not contribute to the unnecessary depletion of underground water reserves. 41/ Secretary Udall said:

38/ Id.

39/ Id.

40/ For further discussion and an indication of possible subsequent Congressional authorization for such a "full return" policy see pp. 254-58, *infra* and *Richardson v. Udall*, 253 F. Supp. 72, 79 (D. Idaho 1966) where the court said: "The Congressional policy of allowing homestead entries on Taylor Grazing land where such land is more valuable for agricultural purposes remains unchanged today. There has been no Congressional deviation in such policy which would now require the government to receive full market value on public lands which are to be disposed of." Also, it should be noted that the Secretary has authority to issue appropriate regulations to carry into execution every part of Title 43. This authority is given in 43 U.S.C. sec.1201 (1964).

41/ B.L.M. Manual, Vol. V, Part 2, ch. 2.22, Appendix 2 (November 1, 1961).

The old policy clearly did not give adequate protection for farmers and other water users near Federal lands Under the previous policy new agricultural land entries--even submarginal ones-- were often allowed, which jeopardized existing uses and did not treat water as a renewable resource. We are moving rapidly in States such as Arizona into a period of acute water crisis if present growth rates continue, and Federal policies must recognize this paramount fact and place water conservation first in the order of priorities. 42/

Secretary Udall explained in his release that the need for the new conservation policy became apparent during review of appeals of some 300 applications for homestead entries in Arizona. The applications were rejected because the current water requirements for the irrigation of lands already under cultivation exceeded the annual rate of recharge to the underground.

The conservation policy issued by the Secretary states:

1. Wise conservation of the water resources of the arid and semi-arid lands of the United States must now be a paramount objective of resource management.

2. . . .

3. . . .

4. In all its program, the Department of the Interior will adopt policies which encourage the management of water as a renewable natural resource.

5. Henceforth, wherever possible, the Department of the Interior will conduct its land management activities on Federal lands in a manner to promote the conservation of water supplies. In its land disposition programs, the Department will avoid actions which would endanger the supply of adequate water for existing users or encourage the unwise dissipation of water reserves. 43/

42/ Id.

43/ B.L.M. Manual, Vol. V, Part 2, ch. 2.22, Appendix 3 (November 1, 1961) (emphasis added).

These two 1961 policy statements are still included in the Bureau of Land Management's manual and therefore presumably followed by Bureau personnel in making classification decisions and in disposing of land. Much of the essence of the policies has been incorporated in classification regulations promulgated by the Secretary since 1961, as will be seen in the following section on regulations.

2. The Classification Regulations Promulgated by the Secretary of the Interior

The present regulations governing classification are, for the most part, set forth in Part 2410 of Title 43 of the Code of Federal Regulations. There are some references to classification in other parts, but they are generally related to unusual situations. 44/

The objectives of the regulations in Part 2410 are stated to be as follows:

(I)t is the policy of the Secretary (a) to specify those criteria which will be considered in the exercise of his authority and (b) to establish procedures which will permit the prompt and efficient exercise of his authority with, as far as is practicable, the knowledge and participation of the interested parties, including the general public. Nothing in these regulations is meant to affect applicable State laws governing the appropriation and use of water, regulation of hunting and fishing or exercise of any police power of the State. 45/

The statutes cited in section 2410.0-3 of the regulations 46/ as authority for the Secretary to classify lands as suitable for agricultural uses are:

- (1) Section 7 of the Taylor Grazing Act;
- (2) Section 3 of the Act of August 28, 1937; 47/
- (3) The Public Land Sale Act of September 19, 1964; and

44/ For instance, 43 C.F.R. sec. 2221.07(e) (1968) prescribes special rules for classifying lands for soldiers' additional homesteads.

45/ 43 C.F.R. sec. 2410.0-2 (1968).

46/ All sections of the regulations cited hereafter in this chapter are part of Title 43 C.F.R. (1968).

47/ 50 Stat. 875; 43 U.S.C. sec. 1181c (1964).

(4) The Classification and Multiple Use Act of September 19, 1964.

In the regulations the Secretary has delegated his authority to classify lands to the Director, Bureau of Land Management, the State Directors of the Bureau of Land Management and to any persons authorized to act in their names. 48/ The regulations also define agricultural as referring to the growing of cultivated crops. 49/

a. General Criteria for all Classification

Section 2410.1-1 of the regulations sets forth the general criteria for all land classification. It requires that all classifications "give due consideration to ecology, priorities of use, and the relative values of the various resources in particular areas." This language is exactly the same as that in the Classification and Multiple Use Act of 1964. 50/ This section also requires that all classifications be consistent with the following criteria:

(1) The lands must be physically suitable or adaptable to the use or purposes for which they are classified. . . .

(2) All present and potential uses and users of the land will be taken into consideration. All other things being equal, land classifications will attempt to achieve maximum future uses and minimum disturbance to or dislocation of existing users.

(3) All land classifications must be consistent with State and local government programs, plans, zoning, and regulations applicable to the area . . . to the extent such . . . regulations are not inconsistent with Federal programs, policies, and uses

(4) All land classifications must be consistent with Federal programs and policies 51/

48/ 43 C.F.R. sec. 2410.0-4 (1968).

49/ 43 C.F.R. sec. 2410.0-5(d) (1968).

50/ See pages 228-30, supra.

51/ 43 C.F.R. sec. 2410.1-1(a)1-4 (1968).

Section 2410.1-1(b) sets forth the criteria to be followed when land has potential for either retention or for multiple use management. It states:

When, under the criteria of this part, a tract of land has potential for either retention for multiple use management or for some form of disposal, or for more than one form of disposal, the relative scarcity of alternative means and sites for realization of those values will be considered. Long-term public benefits will be weighed against more immediate or local benefits. The tract will then be classified in a manner which will best promote the public interests.^{52/}

Under these criteria, it would seem possible to give consideration to such things as the likelihood of land being put in a soil bank or used to grow surplus crops if it is classified for disposal.

b. Criteria for Classifying for Disposal

The criteria to be followed in classifying land for retention for multiple use management are set forth in section 2410.1-2; and the criteria to be followed in classifying land for disposal are contained in section 2410.1-3. This latter section contains five sub-sections. The fourth sub-section sets forth the additional criteria for classification of lands valuable for residential, commercial, agricultural or industrial purposes and is the most important for purposes of this study. These additional criteria with emphasis added, are as follows:

(d) Additional criteria for classification of lands valuable for residential, commercial, agricultural, or industrial purposes. (1) Lands which have value for residential, commercial, agricultural, or industrial purposes, or for more than one of such purposes, will be considered chiefly valuable for that purpose which represents the "highest and best use" of the lands, i.e., their most profitable legal use in private ownership.

(2) Lands may be classified for sale pursuant to the Public Land Sale Act as being chiefly valuable for residential, commercial, agricultural, or industrial uses or development (other than grazing use or use for raising native forage crops), if (i) adequate zoning regulations are in effect, and, where the lands also are needed

for urban or suburban development, (ii) adequate local governmental comprehensive plans have been adopted.

(3) Lands determined to be valuable for residential, commercial, agricultural, or industrial purposes may be classified for disposal under any appropriate authority other than the Public Land Sale Act if (i) disposal under such other authority would be consistent with local governmental comprehensive plans, or (ii) in the absence of such plans, with the views of local governmental authorities.

(4) Land outside of Alaska may be classified as suitable for homestead entry under Subpart 2211 of this chapter if they are (i) chiefly valuable for agricultural purposes, and (ii) suitable for development as a home and farm for a man and his family, and (iii) the anticipated return from agricultural use of the land would support the residents. If it is determined that the irrigation of land otherwise suitable for homestead entry would endanger the supply of adequate water for existing users or cause the dissipation of water reserves, such land will not be classified for entry. Land may be classified for homestead entry only if rainfall is adequate, or if under state law, there is available to the land sufficient irrigation water, to permit agricultural development of its cultivable portions.

(5) Lands may be classified as suitable for desert land entry under Subpart 2226 of this chapter if (i) the lands are chiefly valuable for agricultural purposes, and (ii) all provisions concerning irrigation water set forth in sec. 2410.1-3(d) (4) are met.

(6) Lands outside of Alaska may be classified as suitable for Indian allotment under Subpart 2212 of this chapter if (i) the lands are valuable for agricultural purposes, and (ii) the lands are on the whole suitable for a home for an Indian and his family, and (iii) the anticipated return from agricultural use of the land would support the residents, and (iv) the requirements for water supplies set forth in sec. 2410.1-3(d) (4) are met.^{53/}

It is interesting to note that subparagraph (1) provides that in determining the relative value of land for residential, commercial, agricultural or industrial purposes consideration will be given to that purpose which represents the "highest and best use". Highest and best use is equated with the most profitable use in private ownership and not the use that will "best promote the public interests." This latter phrase is used in section 2410.1-1(b)^{54/} which governs classification in those instances where the land has potential for either retention for multiple use management or for some form of disposal or for more than one form of disposal. The apparent, somewhat anomalous, result of subparagraph (1) if literally applied is that land whose most profitable use in private ownership is definitely for agriculture and which has no potential for retention for multiple use management must be classified for some form of disposal for agricultural use regardless of the effect on the public interest.

Subparagraph (4) of section 2410.0-3(d) permits lands to be classified as suitable for homestead entry if they are chiefly valuable for agriculture and capable of supporting a man and his family from the production of agricultural crops. Thus, in order for land to be opened for homestead entry, pursuant to the first and fourth subparagraphs, it must be capable of producing sufficient crops to support a man and his family but at the same time not be more profitable if put to some other use.

Subparagraph (4) also provides that land may be classified for homestead entry only if the rainfall is adequate or under the applicable state law there is sufficient water for irrigation. The regulation further states that the land will not be classified for homestead entry if irrigating it will endanger someone else's water supply or dissipate water reserves. This is consistent with Secretary Udall's September 24, 1961, policy statement discussed above which was intended to protect existing water users and prevent unnecessary depletion of underground supplies. Subparagraphs (5) and (6) apply these same provisions concerning irrigation to desert land entries and Indian allotments respectively. As will be seen later, these criteria concerning irrigation play a very important role in many classification decisions.

c. Procedural Regulations

Section 7 of the Taylor Grazing Act provides that the Secretary of the Interior may undertake classification of lands on his own initiative, but when an application to make entry under the public land laws is filed in the proper land office the Secretary must classify the land. ^{55/} In addition

^{54/} See page 238 above.

^{55/} 43 U.S.C. sec. 315f (1964).

to promulgating regulations setting forth the criteria to be followed in classifying lands, the Secretary also has issued special regulations governing classification procedures which are supplemental to the general Bureau of Land Management public administrative procedures found in Group 1800, Chapter II of Title 43 of the Code of Federal Regulations. These special procedural regulations, which are contained in Subpart 2411 of Title 43, require the filing of a "petition - application" on a form approved by the Director of the Bureau of Land Management whenever the land must be classified before an application for entry can be approved and the filing of applications prior to classification is permitted.^{56/}

When the petition - application is filed a preliminary determination must be made by the authorized officer as to whether it is in proper form. If it is, he must proceed to classify the land. Until the land has been classified for the purpose requested in the petition - application no further consideration is to be given to the application.^{57/}

After the preliminary determination the State Director of the Bureau of Land Management is required to make and issue a proposed classification decision which must contain a statement of reasons supporting the decision. If the decision affects more than 2,560 acres and would lead to the disposal of the lands the decision must be published in the Federal Register and a newspaper having general circulation in the vicinity of the affected land.^{58/}

The regulations also provide that when multiple petition - applications for the same land are filed, the first one filed is given preference. In case of simultaneous filing, preference is determined by drawing. If the proposed classification is for a purpose other than that requested in any petition - application the proposed decision must state that the land will be opened to application to all qualified individuals on an equal opportunity basis.^{59/}

(1) Protests and Administrative Review of Classifications

(a) Protests

^{56/} 43 C.F.R. sec. 2411.1-1(a) (1968).

^{57/} 43 C.F.R. sec. 2411.1-1(b) (1968).

^{58/} 43 C.F.R. sec. 2411.1-1(c)(1) (1968).

^{59/} 43 C.F.R. sec. 2411.1-1(c)(2) (1968).

The special regulations regarding protests to proposed classifications provide that any interested party may file a protest with the state director within 30 days after the proposed classification decision has been served upon the parties.^{60/} No particular form is required for the protest. If no protests are filed, the proposed classification is issued as the initial classification decision of the state director.^{61/} If protests are filed, they must be reviewed by the state director. He may require statements or affidavits, take testimony or conduct further investigations in considering the protest. At the conclusion of such review the state director must issue an initial classification decision which may revise the original proposed decision. ^{62/}

(b) Administrative Review

For a period of 30 days after service on all parties, the initial classification decision of the state director is subject to the exercise of supervisory authority by the Secretary of the Interior for the purpose of administrative review.^{63/} If within that 30 day period the Secretary has not exercised his supervisory authority for review, either on his own motion or that of a protestant or applicant, the initial decision becomes the final order of the Secretary.^{64/} If the Secretary does exercise supervisory authority, such action automatically vacates the initial decision and the final departmental decision must be issued by the Secretary.^{65/}

A final order of the Secretary continues in full force and effect as long as the lands remain subject to classification or until an authorized officer revokes or modifies it.^{66/} The last subparagraph of section 2411.1-1 provides, however, that nothing in that section will prevent the Secretary "personally and not through a delegate" from vacating or modifying one of his final orders.^{67/}

^{60/} 43 C.F.R. sec. 2411.1-1(d)(1) (1968).

^{61/} 43 C.F.R. sec. 2411.1-1(d)(2) (1968).

^{62/} 43 C.F.R. sec. 2411.1-1(d)(3) (1968).

^{63/} 43 C.F.R. sec. 2411.1-1(e)(1) (1968).

^{64/} 43 C.F.R. sec. 2411.1-1(e)(2) (1968).

^{65/} 43 C.F.R. sec. 2411.1-1(e)(3) (1968).

^{66/} 43 C.F.R. sec. 2411.1-1(f)(1) (1968).

^{67/} 43 C.F.R. sec. 2411.1-1(f)(2) (1968).

If the provisions of section 2411.1-1 are applicable to a petitioner--applicant or protestant, his only right to administrative review of an adverse decision is that afforded by section 2411.1-1 and he has no right to appeal under the provisions of Parts 1840 and 1850 of Chapter II, Title 43 of the Code of Federal Regulations, ^{68/} which contain the Bureau of Land Management general procedures for appeals to the Director of the Bureau and then to the Secretary of the Interior. The right to appeal to the Director of the Bureau is generally a rather highly circumscribed right. The forms, time and place for filing such appeals and the hearing procedures will not be gone into in detail here, but are covered in the separate study on administrative procedures.

(2) Special Procedures for Classifying Lands in Excess of 2,560 Acres for Disposal

Special regulations have been promulgated to cover the classification for disposal of tracts larger than 2,560 acres. These are found in section 2411.1-2. Basically these procedures amplify the provisions of sections 2 and 4 of the Classification and Multiple Use Act of 1964 relating to public notice requirements for proposed classifications of more than 2,560 acres and the effect such notices have on segregating the lands involved from settlement, location, sale, selection, entry, lease, or other formal disposal. ^{69/} The regulations prescribe notice requirements for any proposed classification far in excess of those specified in the Act. Under the regulations, notices must be sent to the governing body of the state political subdivision having jurisdiction over zoning of the affected area, to the governor of the state, to the Bureau of Land Management's multiple use advisory board in that state, to the land use planning officer and land use planning committee, if any, of the county in which the lands are located, to the authorized users of the lands, to any petitioner - applicants involved and to any other party the authorized officer determines has an interest in the proposed use. ^{70/} The regulations also provide that a public hearing must be held on the proposed classification if it affects more than 25,000 acres or if the authorized officer determines that sufficient public interest exists to warrant the time and expense of such a hearing. ^{71/}

^{68/} 43 C.F.R. sec. 2411.1-1(e)(4) (1968).

^{69/} 43 U.S.C. secs. 1412, 1414 (1964).

^{70/} 43 C.F.R. sec. 2411.1-2(b) (1968).

^{71/} Id.

The regulations relating to the segregative effect of publication of notice of the proposed classification in the Federal Register 72/ are in conformance with the provisions of the 1964 Classification Act 73/ except that they further provide that the publication of such notice "will not alter the applicability of the public land laws governing the use of the lands under lease, license, or permit, or governing the disposal of their mineral and vegetative resources, other than under the mining laws."74/

(3) The Rights of Petitioner - Applicants Under the Procedural Regulations

The regulations provide that when a person files a petition - application he obtains no right to occupy or settle upon the land. He is entitled to possession and use of the land only after his entry, selection, or location has been allowed, or a lease has been issued. Any settlement prior to that time constitutes a trespass.75/

However, when land is classified for entry under section 7 of the Taylor Grazing Act or under the Small Tract Act pursuant to a petition - application, the petitioner - applicant is entitled to a preference right of entry if he is qualified. If he should prove not to be qualified and it is necessary thereafter for any reason to reject his application, the next petitioner - applicant in order of filing succeeds to the preference right and if there is no other petitioner - applicant the land may be open to application by all qualified individuals on an equal opportunity basis after public notice, or the classification may be revoked by the authorized officer. 76/

After lands have been classified for disposal the authorized officer is required at the appropriate time to open them to those forms of disposal consistent with the classification.77/ After lands are classified and opened, all the laws and regulations governing the particular kind of entry, location selection or other disposal must be complied with in order for title to vest or other interests to pass. After lands

72/ 43 C.F.R. sec. 2411.1-2(e) (1968).

73/ 43 U.S.C. sec. 1414 (1964).

74/ 43 C.F.R. sec. 2411.1-2(e)(1) (1968).

75/ 43 C.F.R. sec. 2411.1-3 (1968).

76/ 43 C.F.R. sec. 2411.1-4 (1968).

77/ 43 C.F.R. sec. 2411.1-5 (1968).

are classified for disposal they must be offered for sale or other disposal consistent with the classification.78/ Thus, after all of the requirements of the classification laws have been met, the entryman must then comply with all of the requirements of the particular law under which he is entering. It is at this point in the present procedure that the homestead, desert land entry, Indian allotment and other disposal laws become of prime importance. If the proper classification is not obtained for the land, the particular disposal law which the petitioner - applicant intended to rely upon never becomes effective as to that land.

3. The Bureau of Land Management Manual

Along with the published regulations there are provisions in the Bureau of Land Management (BLM) Manual covering classification. These are in sections 2410, 2411 and 2412 of the manual. Generally these provisions conform to the requirements of the statutes and regulations with some elaboration. In some instances they give very detailed directions on how the Bureau staff is to carry out classification.

a. The Bureau's Master Plan and Zoning Regulation Requirements

The manual emphasizes that great consideration is to be given to local government master plans and zoning regulations in classifying lands.79/ Also the need for considering the effect of classification and disposal of land on growing communities is stressed. For instance, the provisions on disposal classification criteria 80/ set forth instructions for disposals within areas of influence of growing communities, and disposals outside of areas of such influence. The manual states that but for exceptions which may be granted by the Director of the Bureau "disposals within the area of influence of growing communities will be deferred until local government master plans have been adopted and zoning regulations are in effect". 81/ Disposals in areas outside the influence of growing communities are to be deferred until the views of local government authorities are secured. Even in such areas local government master plans will be preferred, but where conditions in the area are stable and there is little likelihood of change in the foreseeable future and no public values are involved, the existence of a master plan in zoning ordinances will not necessarily be required as a prerequisite to disposal. 82/

78/ 43 C.F.R. sec. 2411.1-6 (1968).

79/ See B.L.M. Manual sec. 2410.13G (July 1, 1968).

80/ B.L.M. Manual sec. 2410.13B (July 1, 1968).

81/ B.L.M. Manual sec. 2410.13B1 (July 1, 1968).

82/ B.L.M. Manual sec. 2410.13C (July 1, 1968).

The manual sets forth specific elements which should be covered by local government master plans and zoning regulations in order to be acceptable to the Bureau.^{83/} The manual prescribes the following zoning ordinance requirements with regard to agricultural uses of land:

(2) The ordinance must establish essential types of zoning districts such as agricultural, ranching forestry, recreation, watershed, residential, commercial, industrial and flood-plain districts, where local conditions require them.

(3) The ordinance must contain safeguards for good land use by:

- (a)
- (b) Preventing conversion of prime agricultural lands to non-farm uses, where suitable but less fertile lands are available;
- (c) Controlling urban-agriculture conflicts or wasteful sprawl by preventing subdivisions and non-farm residences on urban-size lots to be located in agricultural zones^{84/}

The statutory authority for this great emphasis on the need for master plans and zoning regulations is hard to find. Neither the Taylor Grazing Act nor the Classification and Multiple Use Act of 1964 make any mention of either the need or desire for state or local government planning or zoning as a prerequisite for any kind of classification. Section 2 of the Public Land Sales Act of 1964 does provide that no sale shall be conducted under the authority of that Act "until zoning regulations have been enacted by the appropriate local authority."^{85/} While Congress obviously intended the Secretary of the Interior to administer the classification and public land sales acts harmoniously and granted the Secretary great discretionary authority in classifying lands, it is still questionable whether Congress intended to give the Secretary the power to compel local governments to adopt master plans and zoning regulations as a condition to his permitting the disposal of lands. It is even more questionable whether the Secretary can prescribe precisely what the

^{83/} B.L.M. Manual sec. 2410.13G (July 1, 1968).

^{84/} B.L.M. Manual sec. 2410.13G2a (July 1, 1968) (emphasis added).

^{85/} 43 U.S.C. sec. 1422 (1964).

zoning regulations must contain. The express prohibition in the Public Land Sales Act against sales in areas without zoning regulations has apparently been interpreted by the Bureau of Land Management as implied authority to require master plans in addition to zoning regulations and to make both requirements apply to all disposal statutes and not just sales under the sales 1964 Act.

b. The Manual Provisions for Bureau Initiated Classifications

Section 2411 of the manual sets forth the procedures to be followed when a petition for classification has been filed and section 2412 describes the procedures for Bureau initiated classifications. The provisions in the former section expand upon the regulations and statutes relating to requests for classification. Nothing in that section regarding agricultural use of land appears to contradict the regulations or statutes.

In section 2412 regarding Bureau initiated classifications, great emphasis is placed on encouraging public participation in the classification process.^{86/} The manual provides that in Bureau initiated classifications an initial analysis will be made which will subdivide the land into the following four types of planning units:

- (1) Type I planning units in which BLM holdings constitute at least 50 per cent of the area.
- (2) Type II planning units in which BLM holdings are somewhat scattered but usually constituting between 30 per cent and 50 per cent of the total area.
- (3) Type III planning units in which the Federal holdings are concentrated but the BLM shares management responsibilities with other Federal agencies.
- (4) Type IV planning units in which either the lands are needed for orderly growth of a community or they are widely scattered tracts of extensive use lands constituting a small percentage of the total planning area.^{87/}

^{86/} B.L.M. Manual sec. 2412.11C (March 15, 1967).

^{87/} B.L.M. Manual sec. 2412.11D3b (August 3, 1966).

Section 2412.11D3c2 of the manual contains the following language on the Bureau's expectations regarding the disposal of lands in each of the four types of units:

(2) Results of the land patterns.

Because the land pattern is based so much on physical characteristics of the land, the provisions of the public land laws as they exist today make the following expectations probable:

- a. Lands in Type I planning units will be for a substantial period of time, for the most part, remain in Federal ownership. (sic.)
- b. Lands in Type II planning units will, to a large extent, remain in Federal ownership for a substantial period of time. However, disposals of some lands will take place and adjustments through leases, exchanges, use agreements, and the like will be common.
- c. Lands in Type III planning units will remain in Federal ownership for the indefinite future, after some eliminations are made under current review programs.
- d. It is expected that much of the lands in Type IV planning units will be transferred out of BLM administration, over a period of many years, through State selections, sales, grants, exchanges, withdrawals, reservations, etc. 88/

The manual language suggests that the Bureau policies do not contemplate much disposal of Bureau land in the near future, except for lands in urban areas and isolated tracts.

D. The Interpretation and Application of the Laws and Regulations

There are not a great number of court decisions interpreting the classification laws. This is probably due in part to the brevity of section 7 of the Taylor Grazing Act, the great amount of discretion given to the Secretary of the Interior in making classification and the small economic value of many of the tracts of land sought by prospective entrymen. While there have been relatively few court cases

88/ B.L.M. Manual sec. 2412.11D3c (August 3, 1966).

on classification, there has been no shortage of administrative decisions. These administrative decisions reveal the Department of the Interior's views on classification and the disposal of land for agricultural use. They are important because they show what really happens when lands are classified.

1. Interpretation of the Taylor Grazing Act

The courts, the Solicitor of the Department of the Interior and the Secretary have all been required to render opinions on the extent of the Secretary's authority under section 7 of the Taylor Grazing Act. These opinions have dealt with the extent of the land available for classification, the Secretary's authority to classify for retention as opposed to disposal and his right to select the method of disposal if he concludes the land should be disposed of.

a. Opinions of the Solicitor on the Lands Subject to Classification

Shortly after the passage of the Taylor Grazing Act the Solicitor of the Department of the Interior was asked for his opinion on certain provisions of the Act and the effect of Executive Orders Nos. 6910 and 6964. In an opinion issued a few months after the passage of the Taylor Grazing Act, the Solicitor held that while the Act at that time limited the amount of land that could be included in grazing districts to 80 million acres, the Secretary was authorized to classify any unappropriated and unreserved public land. 89/ The Solicitor reasoned that the Secretary had to be able to classify lands in excess of 80 million acres in order to determine which 80 million acres of the unappropriated and unreserved lands should be included in grazing districts. The 1936 amendments to the Taylor Grazing Act 90/ extending the Secretary's classification authority to the lands covered by Executive Orders Nos. 6910 and 6964 rendered this opinion moot.

In another early opinion the Solicitor held that while Executive Order No. 6910 did not apply to preexisting valid appropriations, reservations or withdrawals during the period of their existence, the order did attach to such lands as a secondary claim, being effective upon the termination of the prior claim. 91/ Thus, any appropriated land which subsequently becomes unappropriated comes under the executive withdrawal orders and thereby subject to classification.

89/ Solicitor's Opinion, 55 I.D. 70 (1934).

90/ Act of June 26, 1936, ch. 842, 49 Stat. 1976.

91/ Solicitor's Opinion, 55 I.D. 205 (1935).

In a much later opinion ^{92/} the Solicitor held that the authority of the Secretary under section 7 of the Taylor Grazing Act, as amended, to classify lands does not extend to lands outside of a grazing district which are applied for by a state under section 8 (c) of that act. Section 8 of the Act ^{93/} permits the state to apply for certain lands outside a grazing district in exchange for lands within a grazing district owned by the state. In his opinion the Solicitor stated "(t)he power to classify in one's discretion implies the power to refuse to classify". ^{94/} He held that if the Secretary had the power to refuse to classify he could defeat a state's application for an exchange and that it was not the intent of Congress to permit the Secretary, by means of the power to classify, to reject the privilege conferred upon states under section 8(c).

b. The Authority of the Secretary to Classify for Retention

Although the Solicitor has held that the Secretary does not have the authority under the Taylor Grazing Act to defeat a state's right to exchange land by classifying the lands for some other purposes, the courts have held that the Secretary can classify lands for retention and reject applications to enter the land for Indian allotments or to satisfy lieu selection rights or scrip rights. ^{95/}

One of the leading cases is Carl v. Udall ^{96/} in which the plaintiff sought to compel the Secretary of the Interior to issue a patent to certain lands in the State of Washington. Plaintiff had selected the lands in question to satisfy lieu selection rights under the Act of July 1, 1898. ^{97/} The Secretary rejected the plaintiff's application on the

^{92/} Solicitor's Opinion, M-36178, 61 I.D. 270 (1954).

^{93/} 43 U.S.C. sec. 315g (1964).

^{94/} 61 I.D. at 277.

^{95/} "Lieu selections" have been defined as "A selection in exchange for which the applicant relinquishes his rights or title to other lands which he for some reason cannot or does not wish to acquire or hold." "Scrip" is "A certificate which allows the owner to make a selection of a specified number of acres out of available public lands." Bureau of Land Management, Dept. of the Interior, Glossary of Public Land Terms, at 27, 46 (1959).

^{96/} 309 F. 2d 653 (D.C. Cir. 1962).

^{97/} Ch. 546, 30 Stat. 597, 621.

grounds that the lands had (i) been withdrawn from all forms of appropriation by Executive Orders No. 6910 and 6964, (ii) were subject to classification under section 7 of the Taylor Grazing Act, and were mountainous timber lands not suitable for cultivation and (iii) were lands which in the public interest should be retained. The trial court granted summary judgment for the Secretary and the plaintiff appealed.

On appeal the plaintiff contended that the executive orders left no land available for lieu selection rights and therefore he was in effect denied his rights without due process. He also contended that the Taylor Grazing Act did not give the Secretary authority to reject his application by classifying the lands as necessary to be retained. The appellate court held that the plaintiff had no contractual right and that there were lands available other than those being sought which would satisfy the lieu selection rights. The court also held that the language in section 7 of the Taylor Grazing Act authorizing the Secretary to classify lands as suitable "for any other use" creates a distinct and separate category which may include lands otherwise proper for lieu selection and that section 7 therefore gives the Secretary authority to classify for any use. The court said the Taylor Grazing Act granted the Secretary the authority to classify the lands sought by the plaintiffs so as to retain them in public ownership.

The decision in the Carl case has been followed in similar cases involving applications for Indian allotments and for lands to satisfy scrip rights. ^{98/} In the scrip right cases (Linn Land Co. v. Udall) ^{99/} the plaintiffs tried to compel the Secretary to issue patents to specific parcels of land in satisfaction of their scrip rights. The Secretary claimed that he had classified the lands being sought pursuant to section 7 of the Taylor Grazing Act and that under his classifications the particular lands were not subject to plaintiffs' scrip rights. The plaintiffs argued that Congress never intended the Taylor Grazing Act to affect scrip rights and that the Act was applicable only to lands suitable for grazing. In its decision the court referred to the Carl case and said it was precisely in point on the issue involved. The plaintiffs contended that if the Secretary's interpretation of section 7 was correct then section 7 violated the Fifth Amendment's due process clause in that it impaired the obligations of contracts. The court rejected this argument on several grounds. It stated that the Fifth Amendment's due process clause applies only to the states and not the Federal Government. The court said:

^{98/} Linn Land Co. v. Udall, 255 F. Supp. 382 (D. Oregon 1966); Finch v. United States, 387 F. 2d 13 (10th Cir. 1967).

^{99/} 255 F. Supp. 382 (D. Oregon 1966).

The entire thrust of plaintiffs "due process" argument fails when viewed in the light of the power of the Congress and the Secretary under Article IV, sec.3 of the Constitution, which authorizes the Congress to dispose of and regulate lands belonging to the United States. Of course, all sections of the Constitution must be construed together. Where the alleged injuries from the "taking" are indirect and consequential and result from the exercise of a lawful power, such as the Congress acting under Article IV, sec.3, supra, the Fifth Amendment provision has no application. 100/

The court also said:

It is my view that sec. 7 does not contain an unlawful, unjust or unreasonable delegation of powers to the Secretary. 101/

The authority of the Secretary to reject applications for Indian allotments by use of his classification powers under section 7 was considered in Finch v. United States. 102/ In the Finch case the plaintiffs wanted to settle on certain land that had been withdrawn by Executive Order No. 6910 and have it opened to them to satisfy their Indian allotment rights. The local land office rejected their petitions and applications on the basis that the particular lands would not support an Indian family and were thus not suited for an Indian allotment. The decision of the local land office became that of the Secretary and the plaintiffs brought suit attacking the Secretary's decision as arbitrary and capricious and beyond the authority granted by section 7. The plaintiffs asserted:

(T)hat the Secretary's application of the "too poor in quality" test under present conditions constitutes a complete sterilization of the Indian right to allotment. With substantially all of the public lands now withdrawn from open entry and settlement absent the Secretary's discretionary right to reclassify for entry, the rights of Indians conferred in the Allotment Act, so say appellants, can be and are completely abrogated contrary to law. 103/

100/ Id. at 388.

101/ Id.

102/ 387 F. 2d 13 (10th Cir. 1967).

103/ Id. at 14.

The court characterized the appellants' argument thusly:

Stripped to its bare form, appellants' contention is that under authority of this provision (Section 4 of the General Allotment Act.) they are entitled to make selections and having done so are entitled to the issuance of patents covering the particular lands selected and that this right is not subject to any discretion in the Secretary and cannot be defeated by the latter's exercise thereof. 104/

The government contended that in enacting the Taylor Grazing Act Congress gave the Secretary discretionary power to determine what lands will be available for Indian allotments. The court weighed these opposing arguments and concluded that the government's position was correct. The court said:

It seems an impalpable contention that Congress intended to place the public domain beyond discretionary control and vest in individual Indian applicants an absolute right to the land of their choice. . . .

The appellants err not in asserting their right to an allotment but in asserting that they have an absolute right to the particular lands in question. The Secretary's construction of the Taylor Act is consistent with the Allotment Act. . . . As the Secretary said in John E. Balmer 71 I.D. 66, 68 (1964), "An Indian applicant is not, of course, deprived of his right to an allotment when his application is rejected. He is merely required to apply for other land that is suitable for acquisition under the Allotment Act."

The Secretary's construction recognizes the right of an Indian applicant . . . but at the same time gives validity to the Taylor Act which implements the policy that the "Power to withhold from improper disposition and unwise uses is essential to the national policy of conservation of the rapidly diminishing public domain and its natural resources" (Citing Carl v. Udall (footnote omitted)) Nor is conservation the only reason for discretionary control. The President acting through the Interior Department must determine the agricultural suitability of the land and whether or not an allotment will be in the best interest of the Indian. 105/

104/ Id. at 15.

105/ Id. at 15-16.

The court summed up its decision by stating:

The right to allotment persists and is not "sterilized" but now provides for an administrative judgment about suitability prior to rather than after settlement. 106/

The language of section 7 makes it clear that before one can make a homestead or desert land entry on any of the lands covered by that section the Secretary must classify the land as suitable for such purpose. The Linn Land Company and Finch decisions make it equally clear that classification by the Secretary is also a prerequisite to obtaining land for an Indian allotment or to satisfy lieu selection or scrip rights. 107/ All of the cases show that the Secretary has broad discretion in classifying land and if he classified it as more suitable for a use other than that for which it is sought, his classification will not be disturbed by the courts unless it can be shown that he acted arbitrarily or capriciously.

c. The Authority of the Secretary to Select the Method for Disposal.

While there is question that the Secretary has broad authority to classify lands according to use and on that basis reject applications for homesteads, desert land entries, etc., there has been some question of his authority to determine the method of disposal to be used if he decides that the land should be disposed of. In *Richardson v. Udall* 108/ the court held that if a homestead application is filed the Secretary must classify the land pursuant to section 7 and he is limited to the categories set forth in that act in making

106/ *Id.* at 16: The question of the Secretary's authority to preclude settlement by Indians until the land sought is classified as suitable for allotment is presently being litigated in *Amos A. Hopkins (Dukes) et al. v. United States*, No. 21456, United States Court of Appeals (9th Cir.).

107/ In 1964 Congress passed an act (Act of August 31, 1964, Pub. L. No. 88-545, 78 Stat. 751) declaring that all outstanding lieu selection and scrip rights not satisfied by January 1, 1970 and all soldiers' additional homestead claims not satisfied by January 1, 1975, will become null and void. The act directed the Secretary to classify prior to January 1, 1967, "public lands in sufficient quantity so as to provide each holder of such a claim with a reasonable choice of public lands against which to satisfy his claim." Neither the Linn nor the Finch case mention this 1964 statute. A good discussion of the legislative history of the act, the Secretary's application of it and his attempts to have it amended is given in the case of *Zella Hamlin*, 74 I.D. 400 (1967). The regulations adopted pursuant to the act are found in 43 C.F.R. sec. 2221.07 (1968).

108/ 253 F. Supp. 72 (D. Idaho 1966).

his classification.

The facts in the *Richardson* case are that the plaintiff filed his homestead application in 1961. The land was examined by the local land office and the report stated that the land was suitable for agricultural use and that there was sufficient water available for such purpose. However, the land office classified the land as more valuable for disposal by public sale than by disposal under the Desert Land Act or the Homestead Act and therefore rejected the application. In his decision the acting manager of the land office referred to the fact that there had been previous entries and applications involving the same land but none of them had ever resulted in successful development. He stated that these previous applications and entries had resulted in a great deal of record keeping. He further stated that:

"Under the present Public Land Conservation policy the government must receive a full return for its property in terms of money or other values." 109/

He was apparently referring to the policy announced by Secretary Udall in February, 1961. 110/

The administrative decision was appealed to the court on the issue of whether the Secretary is limited in classifying lands under section 7 to the categories set forth in that statute or whether he may consider other statutory provisions for disposing of land. The court said as far as it could determine the precise issue had never been ruled upon before by the courts. The court reviewed the legislative history of the Taylor Grazing Act and noted that at the time section 7 was under consideration by Congress the Department of the Interior stated that the homestead laws were to remain in effect. From this the court concluded that it was the intent of Congress in enacting the law that the right to homestead should continue wherever the land in question was found to be more valuable for agricultural purposes.

The court distinguished between classifications made by the Secretary on his own initiative and those he is required to make upon the filing of an application for entry. With regard to the former, the court said the Secretary may or may not choose to examine and classify the lands and that if he chooses to act he has at his disposal a variety of statutory

109/ *Id.* at 75.

110/ See discussion of this policy statement on pp. 233-36.

methods in dealing with the land. In such cases he may classify the land under one of the categories set forth in section 7, he may sell it at public auction under 43 U.S.C. section 1171 or deal with it in other ways. But when an application for entry is filed the court said the Secretary's discretion is partially removed.

He still retains discretion to classify the land in question according to the categories set forth in the statute, when an application is filed, but he must act. When he acts and arrives at a classification, it must be supported by substantial evidence.

This language further limits the discretion of the Secretary to the classification categories themselves. The court does not dispute the authority of the Secretary to sell the subject tract under the provisions of 43 U.S.C.A. sec. 1171, "The Isolated Tracts Act," had no application been filed. However, "more valuable or suitable for any other use than the use provided"-the only possible category under which such action could be taken, cannot be construed to mean by sale at public auction. The draftsmen of this language did not use the term "sale". Such "use" must be read to mean for any other purpose for which the government might have need of it. That is, the language clearly contemplates retention by the government.

The Congressional policy of allowing homestead entries on Taylor Grazing Land where such land is more valuable for agricultural purposes remains unchanged today. There has been no Congressional deviation in such policy which would now require the government to receive full market value on public lands which are to be disposed of. 111/

Prior to the Richardson decision the Department of the Interior had assumed the Secretary had the authority under section 7 to select any of the available means of disposal. Typical of its decisions on this subject was the case of John James King. 112/ Mr. King filed a petition-application seeking

111/ 253 F. Supp. at 79 (emphasis added).

112/ A-28592 (Interior Dec., February 21, 1961).

to have some land which had previously been classified for a homestead again classified for that purpose. Lands adjoining those sought by Mr. King had also been classified for homesteads some three and one-half years prior to the time he filed his application. Nevertheless, the land was classified as more suitable for small tract suburban use and his application was rejected. 113/

The Richardson case, which overruled the Department's position, was decided in April, 1966, some 18 months after the enactment of the Classification and Multiple Use and Public Land Sale Acts of September 19, 1964. Yet no reference to those acts is contained in the decision. The court limited its discussion to the classification authority given to the Secretary under section 7 of the Taylor Grazing Act and ignored the 1964 Classification Act and the regulations promulgated thereunder which clearly gave the Secretary discretion to classify lands for disposal by public sale. Section 4 of that act 114/ provides that publication of a proposed classification specifies that the land shall remain open "for one or more of such forms of disposal under the public land laws". The section goes on to state, "lands classified for sale or other disposal shall be offered for sale or such other disposal". The court also made no mention of the 1964 Sale Act which directs the Secretary to dispose of public lands that have been classified for disposal and requires that such lands be disposed of either to qualified governmental agencies at the appraised fair market value or to qualified individuals through competitive bidding at not less than the appraised fair market value. 115/ It is impossible to reconcile the Richardson decision with the 1964 acts.

Taking the Department of Interior decisions, the 1964 acts and the Richardson case together, it appears that the Secretary has always felt that under section 7 of the Taylor Grazing Act he could specify the method of disposal to be used, but that this assumption on his part at least prior to 1964, may have been erroneous according to the Richardson case. However,

113/ For other cases in which the Secretary classified land for disposal by sale rather than by homestead or desert land entry see: Orman McClellan Rainwater, A-28108 (Interior Dec., April 19, 1960); Lewis Lafon Gourley, A-28497 (Interior Dec., November 6, 1961); and Tim Jim Griffith, A-28124 (Interior Dec., January 15, 1960). The Griffith decision stated that the rejection of the applicant's homestead petition was without prejudice to his right to bid at the sale.

114/ 43 U.S.C. sec. 1414 (1964).

115/ 43 U.S.C. sec. 1421 (1964).

the 1964 acts leave no doubt that today the Secretary does have such authority.

2. Interpretation of the Secretary's Discretionary Authority

a. Court decisions

Section 7 of the Taylor Grazing Act expressly provides that the Secretary is authorized "in his discretion" to examine and classify lands.

The courts have long held that the discretionary authority given to the Executive Department to make land classifications will not be interfered with as long as it is not exercised fraudulently, arbitrarily or capriciously. If the discretion is properly exercised the decisions of the Executive Department are considered conclusive and not subject to review by the courts. This principle was set forth by the Supreme Court in a decision prior to the turn of the century in the following manner:

It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the Land Department, and that its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the Land Department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc. which permit any determination to be reexamined. 116/

This general rule was restated more recently in Bedke v. Quinn 117/ involving a decision of an officer of the Bureau of Land Management which affected a grazing right under the Taylor Grazing Act. In the Bedke case the court said:

The Court cannot exercise the agency discretion, but it can inquire into whether that discretion has been properly exercised. 118/

116/ Burfenning v. Chicago, St. Paul, Minneapolis & Omaha Ry., 163 U.S. 321, 323 (1896).

117/ 154 F. Supp. 370 (D. Idaho 1957).

118/ Id. at 371.

The court held that the officer's action in reducing a grazing right was a discretionary act and as long as it was not exercised arbitrarily or capriciously or in excess of statutory authority it would be upheld. 119/

The extent of the Secretary of the Interior's discretionary authority in determining whether to retain or dispose of land was reemphasized in two fairly recent 9th circuit decisions; Ferry v. Udall 120/ and Lewis v. Udall. 121/ In both cases the Secretary through his appropriate delegate originally decided to dispose of certain tracts of land under appropriate statutes providing for sales. In the Ferry case the plaintiff was the high bidder at the proposed sale and in the Lewis case the plaintiff was a contiguous land owner who offered to match the high bid under the Act of July 30, 1947. 122/ Before completing the sales the Secretary changed his mind and rejected the offers in both cases. Thereupon the plaintiffs sued contending that the Secretary had no right to reject the offers. In both cases the court held that the decision to sell or not to sell was entirely within the Secretary's discretion and his decision to reject the offers and call off the sale was not an abuse of discretion. The court said that the plaintiffs in both cases had no legal standing to compel the sales and had acquired no rights in the land against the United States. In the Lewis case the Court said:

After classification of the land under 43 U.S.C. sec. 315f appellants clearly had a "preference right", but that right was one against other applicants for the land, not against the United States. 123/

b. Administrative Decisions

As might be expected, "the Department (of the Interior) has consistently held that classification is a discretionary matter". 124/ But the Department has recognized that this power of the Secretary is not without limits.

119/ The courts' lack of jurisdiction to review the Secretary's discretionary classification under section 7 of the Taylor Grazing Act in the absence of fraud, arbitrariness, etc. was also recently affirmed in Linn Land Co. v. Udall, 255 F. Supp. 382, 386 (D. Oregon 1966).

120/ 336 F.2d 706 (9th Cir. 1964).

121/ 374 F.2d 180 (9th Cir. 1967).

122/ Ch. 383, 61 Stat. 630 (codified at 43 U.S.C. sec. 1171 (1964)).

123/ 374 F.2d at 182.

124/ J.C. Aldrich, 59 I.D. 176, 187 (1946).

The discretion which section 7 confers on him to examine and classify lands and to restore or to refuse to restore them to public disposition is no absolute discretion to be exercised arbitrarily or willfully. It is instead a sound, impartial discretion guided and controlled not only by a due regard for the facts in a particular case, among them those bearing on the public interest, but by a punctilious respect for the established principles of law applicable thereto. 125/

The Department has held the discretionary authority to classify lands delegated to the Secretary permits him to consider all possible uses for land and not only those uses for which it is being sought by a petitioner - applicant. This position was expressed in a decision as follows:

The authority of the Secretary of the Interior under section 7 of the Taylor Grazing Act to classify land is not limited to a mere determination as to whether a tract of land applied for under a certain act meets the requirements of that act. Other factors bearing upon the most appropriate use of the land can be considered. 126/

The discretion of the Secretary to consider all potential uses of the land was thoroughly discussed in the case of Calvin B. Neeley, 127/ which also involved the relationship of the classification powers under section 7 of the Taylor Grazing Act with the authority to withdraw public lands from entry. In the Neeley case the Secretary rejected a desert land application and classified the land for retention for an experimental range research program. In his appeal Neeley contended that "in classifying the lands for retention the Bureau circumvented procedures established by this Department for withdrawing lands to be retained by the Government for purposes authorized by statute. . . ." 128/ The Secretary said:

He (appellant) would, apparently, limit the authority to classify under section 7 of the Taylor Grazing Act to criteria determining whether the lands are more suitable for

125/ Allison and Johnson by Ted E. Collins Rehearing, 58 I.D. 227, 240 (1943).

126/ Vladimir P. Havlik, Joseph V. Havlik, 61 I.D. 294, 297 (1954).

127/ A-30235 (Interior Dec., October 12, 1964).

128/ Id. at 2.

grazing purposes or for purposes under which the land can be opened "for entry, selection, or location for disposal in accordance with the classification made".

To hold, as appellant desires, would preclude the Secretary of the Interior from exercising any discretion under the Taylor Grazing Act to retain lands in Federal ownership where it is believed to be in the public interest to do so, and would permit discretion to be exercised only as between conflicting applications under various public land laws, or where it is clear that the lands are more valuable for grazing than for the purpose sought, regardless of their value for other related or unrelated Federal purposes. The appellant's insistence that the lands involved here must be withdrawn under formal and established procedures where protests may be made and hearings held, if warranted, would negate the purposes and effect of Executive Order No. 6910 and the Taylor Grazing Act. . . . This Department has never interpreted or applied the act in the limiting way which appellant would have. Thus, for example, lands have been classified for retention in Federal ownership rather than for desert land or homestead entry where they are valuable for fishing and other recreational uses (Robert Dale Scarrow, A-27023 (January 11, 1955)); where the land is needed for wildlife use in connection with a cooperative wildlife development plan between the Federal and a State government (Earl L. Wakefield, A-27049 (January 12, 1955)); and where allowance of an entry would disrupt an existing grazing district reseeding project (Richard J. Bostrom, Fred H. Winters, A-27618 (August 27, 1958)). 129/

This broad discretionary power to classify has been interpreted by the Department of the Interior and its Solicitor to include the authority to refuse to classify. The Solicitor has stated "(t)he power to classify in one's discretion implies the power to refuse to classify". 130/

129/ Id. at 2-3 This interpretation by the Secretary of his discretionary authority to classify lands and its relationship to the withdrawal procedures is discussed more thoroughly in the Study of Withdrawals and Reservations of Public Lands, at 211-228 and 466-468.

130/ Solicitor's Opinion, M-36178, 61 I.D. 270, 277 (1954).

In Andrew W. Kern, 131/ a desert land entry application was rejected on the grounds that consideration of further agricultural development should be postponed for four years until the Humboldt project produces definite information on the volume of underground water in the Humboldt River Basin. The decision to reject the application was in effect a refusal to classify.

The Department's decisions have also stated:

The determination as to under which of the public land laws a portion of the public domain should be disposed is entirely within the discretion of the Secretary. 132/

But the correctness of that position was questioned by the court in Richardson v. Udall. 133/ Despite this one court case, it is obvious that the Secretary has vast discretion in making classifications and as long as his decisions are not capricious, they will be upheld.

3. The Application of the Classification Criteria to Specific Situations

The Department of the Interior has had to apply the criteria established for classification to a wide variety of situations. An examination of its decisions shows how these criteria have been applied in the most frequently reoccurring kinds of cases. These decisions very often constitute the law on classification as far as an individual petitioner-applicant is concerned. If he does not like a classification made by the Secretary, his only recourse is to convince a court that the Secretary has abused his discretion or get Congress to change the legislation. Neither course of action is easy.

a. Economic Feasibility

The regulations provide that land may be classified for homestead entry if it is chiefly valuable for agricultural purposes and the anticipated return from agricultural use will support a man and his family. 134/ They also provide that lands may be classified as suitable for desert land entry if they are "chiefly valuable for agricultural purposes" and may be classified as suitable for Indian allotment if they

131/ A-28929 (Interior Dec., September 25, 1962).

132/ John James King, A-28592, at 2 (Interior Dec., February 21, 1961), See also William John Mauro, A-27318 (Interior Dec., July 13, 1956); and Darwin M. Cecil, Joseph Casaletto, A-27047 (Interior Dec., January 14, 1955).

133/ 253 F. Supp. 72 (D. Idaho 1966) as discussed, supra.

134/ 43 C.F.R. sec. 2410.1-3(d)(4) (1968).

are "valuable for agricultural purposes". 135/ The extent to which economic feasibility must be demonstrated in order to obtain a classification for agricultural use has been the subject of a number of decisions.

Where it is obvious that it is economically unfeasible to farm, classification for agricultural use has consistently been refused. For instance, in Edwin H. Richardson, 136/ an analysis of the land being sought for a homestead entry showed that it would cost over \$3,600 to produce a crop which would return only \$2,300 and in his decision the Secretary said:

With such a snowing of the economic infeasibility of agricultural development of the land it is apparent that the purpose of the homestead laws cannot be satisfied here. At least there should be the possibility that anticipated monetary returns can meet the income needs of a farm family. 137/

While the Richardson decision states that there should be a possibility of meeting the needs of a farm family, the Secretary has stated that complete economic self-sufficiency is not a requirement to obtain a classification for agricultural use. In Thomas Owen Westbrook 138/ it was held that:

(T)here is no requirement in the homestead law that an entry must be entirely self-sufficient, although the economic sufficiency of a tract is an important element to consider in determining whether land should be classified as suitable for homestead entry. 139/

Some of the decisions indicate that in considering economic feasibility the Secretary is influenced not only by the potential monetary return from agricultural crops, but by the economic value of other possible uses of the land.

135/ 43 C.F.R. secs. 2410.1-3(d)(5)-(6) (1968).

136/ A-30639 (Interior Dec., August 31, 1967).

137/ Id. at 7.

138/ 60 I.D. 296 (1949).

139/ Id. at 298. See also Pete S. Stoneham, A-28679 (Interior Dec., September 18, 1961).

This was evidenced in the Richardson case where the Secretary pointed out that the land involved was valued at \$120,000 for subdivision purposes. 140/ Another case in which consideration was given to the economic value of uses other than agriculture is Chester Lamar Bundy, 141/ where the value of land for crops was weighed against its value for grazing. In this interesting decision it was determined that although the economic feasibility of farming was very questionable, farming was probably the highest and best use of the land. In reaching a decision the officer said:

A decision either way in this case would have substantial support in the record. There can be no doubt but that the land has very limited use capabilities and that, at best, it could be made to produce a bare livelihood through cultivation. At the same time, it is difficult to see how it would produce less under cultivation than the limited forage values it now offers. On the basis of such comparison alone, the land may be properly classified as more valuable and suitable for cultivation than for grazing. Since allowance of the application would not affect, adversely, the public interest, it is concluded that the application should be allowed even though the applicant would thus be permitted to engage in what might prove to be an uneconomic operation. 142/

In determining economic feasibility consideration has been given not only to the immediate returns that may be realized from the land but also to the long term effects. In Max J. Curtis, 143/ a homestead entry was rejected on the basis that even though crops could be raised for a few years, eventually the accumulation of salts would render cultivation impossible.

The matter of the value of a parcel being sought relative to that of other parcels has been considered in classifying the land. 144/ This question of relative economics usually has come up in classifying lands in water short areas and is discussed more thoroughly in the next section. It is sufficient here to state that the Secretary has continually considered economic feasibility in classifying lands.

140/ A-30639 at 8.

141/ A-26802 (Interior Dec., March 3, 1954).

142/ Id. at 2.

143/ A-28472 (Interior Dec., July 17, 1961).

144/ Otis O. Briant, A-28757 (Interior Dec., March 15, 1962); Lonnie D. Clark, Laura M. Clark, A-28615 (Interior Dec., July 20, 1961).

b. The Availability of Water

The regulations provide that in considering classification of land for agricultural use such a classification should be rejected if it is determined that irrigation of the land would endanger the water supply for existing users or cause a dissipation of the water reserves. The regulations also say that the land may be classified for such entry only if the rainfall is adequate or under state law there is available sufficient water for irrigation to permit agricultural development. 145/ The Department has repeatedly held that desert land entries dependent upon percolating water for irrigation will be allowed only when in the exercise of the discretion vested in the Secretary it is determined that there is a sufficient supply of percolating water to enable the reclamation of the entries, taking into consideration the rights and needs of other lands for such percolating water. 146/

The Department has not only refused to classify lands for agricultural use when irrigating it might affect other people's water supply, but it has also refused such classification if it is determined that the water supply could be put to better use on some other land. In Lonnie D. Clark, Laura M. Clark, 147/ it was stated:

Neither the land office nor the Director indicated any conclusion that the land applied for is unsuitable for cultivation or that water cannot be made available to it. Both suitability of the soil and availability of water might be admitted without in any way altering the decision that the land should not be approved for desert land entry for the reason which both the land office and the Director stated: that the limited water supply . . . would be better used on other land possessing more favorable soils and topography. 148/

In a similar decision, the case of Otis O. Briant, 149/

145/ 43 C.F.R. secs. 2410.1-3(d)(4)-(5)-(6) (1968).

146/ Ruby E. Huffman, 64 I.D. 57 (1957); Ruby D. Moore, 64 I.D. 137, 139 (1957); Frances E. Auen, A-28440 (Interior Dec., April 7, 1961); Reno H. Lewis, A-28457 (Interior Dec., February 20, 1961).

147/ A-28615 (Interior Dec., July 20, 1961).

148/ Id. at 1.

149/ Otis O. Briant, A-28757 (Interior Dec., March 15, 1962).

consideration was also given to priorities for the use of water in rejecting a requested classification for a desert land entry. The facts in the Briant case were that there were some 70,000 acres of land in the valley involved and 200 applications for entry. The water supply was sufficient only to permit development of 7,200 acres. The land at the southern end of the valley had a water table of 20 feet and at the northern end the water table was 300 feet below the surface. There was no question that the land sought by Mr. Briant was suitable for agriculture and that there was water available for it. Nevertheless, the land he sought was not classified for a desert land entry. The decision stated that classifications for desert land entries should not only be restricted to lands having favorable soils and a supply of water but they should be limited to those areas where the water table is highest so that the cost of pumping irrigation water from wells can be minimized. This position that classification for desert land entry should be limited to the acreage of the best soils that can be successfully irrigated has been restated in other cases. 150/

In classifying lands for entry consideration has been given not only to the effect on underground waters, but also to surface supplies. In Hugh S. Ritter, Thomas M. Bunn, 151/ the Secretary rejected requests to classify land in the Imperial Valley of California for desert land entries. Development of the land involved would require Colorado River water. In his decision the Secretary cited Arizona v. California 152/ and said that California is now using over 5,100,000 acre-feet annually from the river which is substantially in excess of the 4,400,000 acre-feet allowed by the Supreme Court. He concluded that it would be contrary to the public interest to increase the pressure on the inadequate supply available to California from the river by classifying the lands involved and other similar lands as available for entry under the desert land law.

The regulations state that "(n)othing in these regulations is meant to affect applicable State laws governing the appropriation and use of water, . . ."153/ Prospective applicants have filed petitions for classification and asserted that their petitions should be granted on the basis that they have obtained water rights or water right permits from their

150/ Roger D. Johnson, A-28734 (Interior Dec., May 17, 1962); Joseph Ortiz Fernandez, A-28772 (Interior Dec., July 12, 1962).

151/ 72 I.D. 111 (1965).

152/ 373 U.S. 546 (1963).

153/ 43 C.F.R. sec. 2410.0-2 (1968).

respective state authorities. A typical case of this type is that of Venice Fairchild, 154/ in which the applicants held a valid permit from the State of Idaho to appropriate underground water for irrigation. They contended that their permit had a priority over others issued for the same area in connection with which desert land entries had been allowed. They further contended that rather than depriving them of the priority which their permit entitled them to, their desert land applications should be granted and the matter of priority adjudicated according to the laws of the State of Idaho. They maintained that the Bureau of Land Management was attempting to adjudicate water rights, a matter to be left to the state. Their appeal was denied. The decision stated:

Assuming that appellants, by reason of permits from the State, have prior rights to the use of water for agriculture which cannot be impaired by a decision of the Bureau of Land Management, it does not follow that these rights attach to the Federal public domain and make mandatory allowance of the desert land entries.

Section 7 of the Taylor Grazing Act, as amended, . . . authorizes the Secretary of the Interior, in his discretion, to examine and classify lands which are more valuable or suitable for the production of agricultural crops than for grazing purposes. The authority thus vested in him, or his delegate, is one to be exercised wholly in his discretion. 155/

The authority of the Secretary to classify lands unsuitable for entry because of an insufficient water supply regardless of state water rights was also discussed Ruby E. Huffman, 156/ which involved the right to use percolating water under California law. The decision thoroughly considered the California law and finally concluded that while the question was not free from doubt, the applicants did appear to have appropriate rights under state law. The decision went on to say, however:

154/ A-29802 (Interior Dec., October 5, 1964).

155/ Id. at 2.

156/ 64 I.D. 57 (1957).

This does not mean, of course, that applications cannot be rejected in the exercise of the Secretary's authority under section 7 of the Taylor Grazing Act, as amended . . . to classify land as suitable or not suitable for desert land entry if he determines that there is an insufficient supply of percolating water to enable the reclamation of the entries, taking into consideration the rights and needs of other lands for such percolating water. 157/

Requests for classification for desert land entries have also been rejected where applicants have sought to transfer existing water rights to the land sought to be entered. In Newell A. Bastian, 158/ it was stated:

Transfer to the lands applied for of any of the rights to available water would be detrimental to the lands to which the

157/ Id. at 69-70. For a very recent case on this same subject see Edna Almeta Walker, A-30907 (Interior Dec., July 25, 1968). Mrs. Walker obtained a water permit from the New Mexico State Engineer and asserted that he was the only person "qualified and authorized to make a determination as to the use of the water" and therefore the lands she sought should be classified for desert land entry. In his decision rejecting Mrs. Walker's application the Assistant Secretary said at page 4: "Although the State Engineer is the person under State law who must approve an application to appropriate underground waters, he is not the person charged with the responsibility of determining whether a desert land entry should be allowed upon Federally owned land. The responsibility of classifying such land for entry rests solely upon the Secretary of Interior and his delegates. The fact that appellant may be entitled under State law to a permit to appropriate water in this basin because of the priority of his application to the State Engineer's Office does not establish that it is in the public interest, as determined by Federal classification standards, for the desert land entry to be allowed."

158/ A-30526 (Interior Dec., June 7, 1966).

water is already allocated, and the lands applied for would not be any more productive if irrigated than would the lands from which the water would be transferred. . . . 159/

Classification for desert land entries have been rejected where the application has failed to show a water supply sufficient to irrigate all the irrigable acreage of the proposed entry. 160/ However, if the applicant can show a water supply sufficient for only a portion of the proposed entry, he may request his application be reduced in size and thereby be able to show adequate water to permit classification of the smaller parcel. 161/

While the Department of the Interior has been patient in permitting applicants to try to show a sufficient water supply, there is a limit to how long it will wait before rejecting an application. In the case of James Patrick Quinn, 162/ the application was rejected because the applicant had been drilling for water for five years to a depth of over 500 feet without being able to develop a water supply. The Department held that such facts warranted the conclusion that there was an insufficient supply.

In a rather unique decision, the Department indicated that the adequacy of a water supply will be determined on the basis of crops typically grown in the area and not on the basis of the need of an unusual type of crop. In Franklin D. Plant, 163/ the applicant sought a homestead classification.

159/ Id. at 1. See also Ewing T. Skinner, A-30468 (Interior Dec., April 5, 1966) where the applicants sought to transfer water rights from land having better soil to land of poorer quality. It might be asked whether this same reasoning would apply to surplus crops and homestead applications. In other words, would a homestead application be denied where the applicants sought to transfer a crop allotment to the proposed entry? Based on Paul Edward Mulvaney, A-28828 (Interior Dec., October 11, 1962) and Edna Almeta Walker, A-30907, at 1 n. 1 (Interior Dec., July 25, 1968) to answer very likely is yes.

160/ Helen Douglas Garner, A-28302 (Interior Dec., January 18, 1961).

161/ Harold Danekas, A-28622 (Interior Dec., December 5, 1962).

162/ A-28634 (Interior Dec., April 11, 1962).

163/ A-29606 (Interior Dec., August 26, 1963).

He said he wanted to grow prickly pear cacti for making cactus candy. In rejecting his application, the Department stated:

"(W)hile the appellants may be willing, even eager, to engage in the production of an atypical crop with a lower water requirement than the crops typical for the area, this does not warrant classification of the land as suitable for the production of cultivated crops as contemplated by the homestead law." 164/

Apparently in classifying lands, no incentive is given for ingenuity.

c. Soil Quality.

Classification for agricultural purposes has often been refused because of poor soil. The decisions do not indicate that independent objective standards are necessarily applied in determining soil quality. For instance, the soil classifications developed by the soil conservation and agricultural extension services apparently have not been adopted by the Department of the Interior. Rather, the decisions discussing soil quality generally are concerned about the economic feasibility of producing a crop. As an example, classification for agricultural use was rejected where the soil was found to be too shallow for ordinary cultivation and the land so rough that it had extremely marginal value even for orchard purposes. 165/ In another case the fact that 12 of the 120 acres sought for entry could be cultivated did not establish that the entire parcel should be opened when the remaining land had rough and broken topography and poor soil. 166/ However, in Aldrich E. Bowler, 167/ a classification for desert entry was granted, contingent upon the showing of water, even though the soil was rocky, where there was evidence that there was sufficient irrigable land with good soil to meet the requirements of the Desert Land Act.

In other cases, an application for a homestead was rejected where the physical aspects of the land indicated the improbability of successful cultivation and there was danger of erosion to surrounding land. 168/ Also, a desert land

164/ Id. at 2

165/ Leon G. Beck, A-28591 (Interior Dec., February 13, 1961).

166/ J.J. Williams, Russel W. Button, A-29364 (Interior Dec., December 10, 1962).

167/ A-28155 (Interior Dec., February 18, 1960).

168/ M. Faye Palmer, A-28847 (Interior Dec., June 29, 1962).

entry classification was rejected where the evidence showed the land had a very high salinity content and very low permeability, making it difficult if not impossible to make the land productive even with successive applications of water for leaching 169/

d. The Effect of Urbanization on Classification Decisions

As stated earlier, the Bureau of Land Management Manual places strong emphasis on the effect of classifications and disposal on growing communities. The manual requires local governments to have master plans and zoning regulations before disposal will be approved in areas within the influence of growing communities. 170/ It also stresses the desirability of cooperation with local officials in making classifications. This position of the Department of the Interior regarding cooperation with local governments was stated in a recent decision as follows:

It has long been the stated policy of this Department, even prior to the filing of these small tract applications in 1956, that in classifying public lands for small tract purposes, Bureau of Land Management officials would cooperate with local governmental officials to assure that proper development of an area will be effectuated by the disposal or lease of the public lands under the Small Tract Act. 171/

Requests for classifications for homestead entries have frequently been denied on the grounds that the land is more suitable for disposition under the Small Tract Act. 172/ Homestead entries have also been held to be properly rejected where the land is found to be potentially valuable for residential, commercial or other urban or community use, yet only marginally suitable for agriculture. 173/

169/ Leonard E. Noren, Harry C. Perry, A-27583 (Interior Dec., September 13, 1960).

170/ See pp. 245-47, supra.

171/ J. Wayne Gattshall, A-30520 at 2, (Interior Dec., January 17, 1967).

172/ 43 U.S.C.secs. 682a et seq. (1964). Lewis Lafon Gourley, A-28497 (Interior Dec., November 6, 1961); Orman McClellan Rainwater, A-28108 (Interior Dec., April 19, 1960).

173/ Cold Spring Ranches, Inc., Nev. 058992 (B.L.M. Dec., December 20, 1966) Opal Glodean Johnson, Nev. 058721 (B.L.M. Dec., December 2, 1964).

The change in the urban character of an area has had its effect on classification. As a community grows, the lands surrounding it become more valuable and their highest and best use may change from agriculture to something else. Such changes in areas have resulted in rejections of homestead classifications even though adjacent lands had previously been classified as suitable for homesteads. Changes in an area have also brought about reclassification of land that had been previously classified for homestead entries. Naturally, such changes in classification have not pleased prospective entrymen. In John James King, 174/ the applicant sought a homestead entry on land near Carson City, Nevada, that had formally been classified for homesteads. Also, homestead entries had been allowed on adjoining land about 3 1/2 years before Mr. King filed his application. Nevertheless, the application was rejected because it was found that the land was more suitable for small tract suburban occupancy than for agricultural use, and was therefore properly reclassified.^{175/} It seems certain that in the future, changes in the character of an area from rural to urban or suburban will continue to produce more classifications for disposal by some means other than by homestead or desert land entries.

e. Classification of Timber Lands

Another frequent reason for denying classification requests is the land's timber value. Homestead classifications have generally been denied where land has been found to be more valuable for timber production than for agriculture.^{176/} It is not always necessary that there be standing timber on the land in order for the homestead classification to be rejected. The determining factor is whether the land is more valuable for timber production than for agricultural use, not whether it is presently producing timber. In Thomas L. Browning, 177/ a homestead classification was rejected for land which was in the vicinity of timber land. It was held that all of the land comprised a forest management unit and that the land sought was more valuable for future timber production than for agriculture.

f. Miscellaneous Criteria

In addition to the criteria discussed above, a number of others have been applied in denying classification for agricultural use. For instance, the Department of the Interior

174/ A-28592 (Interior Dec., February 21, 1961).

175/ For a similar case showing the effect of urban growth, see Edwin H. Richardson, A-30639 (Interior Dec., August 31, 1967).

176/ Warren H. Goss, Neil N. Sumner, A-28834 (Interior Dec., September 19, 1962).

177/ A-28782 (Interior Dec., April 3, 1962).

has refused to classify unsurveyed land for desert land entries. In Norman K. Baldwin, 178/ it was noted that under the Desert Land Act entries could not be made on unsurveyed lands. The Decision stated:

(C)lassification should await the making of a survey. Thus, until a survey has been made so that the land can be identified and evaluated for purposes of disposition, there is no occasion to consider an application for classification.^{179/}

In a rather unique decision lands which were once in a military reservation were held to be properly classified as unsuitable for desert land entry because the United States Army had certified them as dangerous for subsurface use due to contamination by unexploded ordinance.^{180/}

In classifying lands for agricultural use consideration has been given to the effect it might have on those holding grazing rights on adjacent land. In John H. and Kathryn Hunter, 181/ a classification for a desert land entry was allowed where it was found that it would not seriously interfere with the livestock operations of the protestants who had grazing rights. The decision emphasized that the maintenance of the grazing district was only an interim use pending the final disposal of the public lands. The decision stated with regard to a grazing right:

It is merely a privilege that may be revoked by the Department for the purposes of disposing of the public land where the land is classified as more valuable for the growing of agricultural crops than for the production of forage plans.^{182/}

In Francis Taylor, 183/ the Secretary granted a classification for a desert land entry but only after taking into account

178/ A-28441 (Interior Dec., August 31, 1960).

179/ Id. at 2. See also Won Wing, A-28420 (Interior Dec., September 19, 1960).

180/ Georgia R. Williams, A-28149 (Interior Dec., January 15, 1960).

181/ Nevada 045409 (B.L.M. Dec., October 7, 1964).

182/ Nevada 045409 at 3.

183/ A-30282 (Interior Dec., October 1, 1964).

the effect on adjacent grazing permittees. He held that the applicant would be required as a condition to the allowance of his entry to reimburse the grazing permittees for the fair market value of their reservoir or to construct a comparable reservoir at a suitable location.

4. The Application of Blanket Classifications to Large Areas

The Department has not limited the use of its classification authority only to classifying specific parcels or tracts of land. The statutes and regulations permit the Secretary to make classifications on his own initiative and blanket classifications have been applied to wide areas using the same criteria applied in classifying single tracts. As an example, in 1959 two decisions were issued denying applications for desert land entries in Southern California.^{184/} Following those decisions, the Department issued a supplemental decision in which it applied a blanket classification to approximately 1,889,280 acres.^{185/} In this blanket decision, the Department stated:

Until further notice any agricultural application (including without limitation homestead and desert land applications) which may hereafter be received for any of the above-described public lands will not be accepted for filing but will be returned to the applicant, accompanied by a notice stating that the lands have been classified as unsuitable for further agricultural entry and that no right of appeal lies from the refusal to accept the application for filing.^{186/}

The decision also had the effect of rejecting all pending agricultural applications. No only did this decision apply a blanket classification to a large tract of land, but it purported to abolish any right of administrative appeal that a future petitioner-applicant might otherwise have. No cases have been found to indicate whether this attempt at eliminating the right to appeal will be effective.

^{184/} Frances Elizabeth Cain, Los Angeles 0145092 (B.L.M. Dec., June 18, 1959); Nick P. Leko, Los Angeles 0151065 (B.L.M. Dec., June 18, 1959).

^{185/} Frances Elizabeth Cain, Nick P. Leko, Los Angeles 0145092, 0151065 (B.L.M. Dec., March 11, 1960); see 25 Fed. Reg. 3532 (1960).

^{186/} Frances Elizabeth Cain, Nick P. Leko, Los Angeles 0145092, 0151065, at 2 (B.L.M. Dec., March 11, 1960).

Blanket classification, like all others, are subject to reclassification and should a petitioner-applicant present a strong case for a change in classification for any of the land involved in the blanket classification his case could be considered on its merits. In other words, the language in the blanket classification regarding the refusal to accept further applications and denying the right of appeal has no finality as will be seen in this next section on reclassifications.

5. Reclassifications

The effect of a classification is not permanent. The opinion of the Department on this subject has been expressed by the Solicitor in the following words:

There is nothing binding about a classification. While it may represent the considered judgment of the classifier based upon the best evidence available at the time of the classification, it is subject to revocation at any time or to revision upon a showing of changed conditions, additional facts, or other factors indicating error in the classification.^{187/}

The Department has repeatedly held that it has this right to reclassify at any time so long as no rights have been initiated in the land previously classified. The position taken by the Department is that until an application for entry has actually been allowed, the land may be reclassified if the facts indicate that such a change is warranted.^{188/}

In Keith J. Davis, ^{189/} the applicant contended that a previous decision of the Department concluding that the lands have agricultural soil was res judicata and that therefore his application for a desert land entry should be allowed. His application was denied on appeal. The decision stated that the matter was not res judicata because so long as no

^{187/} Solicitor's Opinion, M-36178 (Supp.), 61 I.D. 277, 278 (1954). It is interesting to note that this language was quoted in Frances Elizabeth Cain, Los Angeles 0145092 (B.L.M. Dec., June 18, 1959) which was one of the two decisions which lead to the blanket classification discussed above.

^{188/} Lyle Kenneth Gross, A-29783 (Interior Dec., February 19, 1964); K.J. Davis, A-29274 (Interior Dec., October 15, 1963); John James King, A-28592 (Interior Dec., February 21, 1961).

^{189/} A-29274 (Interior Dec., October 15, 1963).

rights have been initiated in the land following the previous favorable classification, the classification could be revoked or modified upon the showing of changed conditions. Thus, it seems clear that there is no finality to a classification until an entry has been allowed and some rights have accrued to an individual under the classification.

6. Administrative Appeals of Classifications and the Burden of Proof.

Closely related to the matter of reclassifying lands is the problem of changing classifications on appeal. The details on administrative procedure are being covered in another study, but it is important here to comment on a few rules governing appeals from classification decisions. The general rule established by the Department, which has been restated in a number of decisions, is:

Where the classification is adverse to the applicant, the burden is upon the applicant, should he appeal the classification, to show in what respect the adverse classification is in error In the absence of an error which appears on the face of the record, the applicant must show by positive and substantial evidence that the land is suitable for agricultural use and that the adverse classification is erroneous. 190/

The rule has been stated even more strongly in Anderson O. Whitener, 191/ as follows:

(T)he burden is upon him (applicant) to show conclusively that the classification is in error, and that an adverse classification will not be disturbed in the absence of a clear showing of error in the classification. 192/

While the Secretary said in Mary Refugio Jackson 193/

190/ Mary Refugio Jackson, A-27236 at 4 (Interior Dec., February 29, 1956). See also Juan M. Beltran, A-27808 (Interior Dec., February 3, 1959).

191/ A-27626 (Interior Dec., December 3, 1958).

192/ Id. at 3 (citations omitted).

193/ A-27236, A-27237 (Interior Dec., February 29, 1956).

that in the absence of an error which appears on the face of the record, the applicant has to show by positive and substantial evidence that the classification was erroneous, there is some indication that occasionally there is deviation from this rule. The case of Harold R. Nelson 194/ was remanded to the Bureau of Land Management because the record before the Department did not contain sufficient information upon which a determination as to the suitability of the land could be made. Thus, while the person seeking a reclassification or change in classification has the burden of proof in most cases, he may be relieved of this burden if the record of appeal fails to show the basis for the original determination.

This exception to the general rule on burden of proof is not only justified on equitable grounds, but has some basis in the regulations. Section 2411.1-1(c) of the regulations requires the state director to include a statement of reasons in his proposed classification decision. If the record on appeal does not contain sufficient information to show the reason for the decision there was probably a failure to comply with the regulations. Under such circumstances it would be unjust to let a decision stand because the appellant could not show conclusively that it was in error. To do so would be to make meaningless the regulation requiring the statement of reasons for the decision.

If an appellant has exhausted his administrative remedies he may be able to bring an action in the Federal courts to have the adverse classification set aside. If he does so it is important that the record during the administrative proceedings be complete. It has also been held that in reviewing decisions of the Secretary of the Interior the court has authority only to consider the record made during the administrative proceedings. 195/

194/ A-28486 (Interior Dec., February 9, 1961).

195/ Noren c. Beck, 199 F. Supp. 708 (S.D. Calif. 1961).

PART II

AGRICULTURAL USE OF FEDERAL LAND BY LEASE OR PERMIT AND A COMPARATIVE REVIEW OF LAWS GOVERNING THE DISPOSAL OR LEASE OF AGRICULTURAL LANDS BY VARIOUS STATES

CHAPTER 7

AGRICULTURAL USE OF LAND UNDER THE ADMINISTRATIVE JURISDICTION OF VARIOUS FEDERAL AGENCIES BY LEASE OR PERMIT

The preceding chapters have reviewed the Federal laws and policies relating to the disposal of public domain lands to individuals for agricultural purposes. These are not all of the Federal agricultural land laws. There are others, some of which provide for the disposal of acquired lands as opposed to public domain lands, and some which permit cultivation of Federal lands under leases or permits. There is also an important law known as the Carey Act which provides for disposal of agricultural lands to various states. Also, many states have laws governing the disposal or leasing of state lands for agriculture.

In this and the next chapter these other Federal agricultural land laws and policies and those of the eleven western states of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming are examined to a limited extent, but not in detail. There is a twofold purpose in reviewing these laws: first, to complete the study of Federal land laws and policies relating to intensive agriculture, and second, to allow comparison of these state and Federal laws with the disposal statutes previously covered. Perhaps the laws and policies reviewed in these two chapters will suggest alternatives for the management or disposal of the remaining public domain suitable for agriculture if the homestead, desert land or allotment laws are ever repealed or substantially changed.

The laws and policies governing agricultural use of land under the jurisdiction of those Federal agencies controlling substantial quantities of land are reviewed in this chapter on an agency by agency basis. This land is not subject to disposal under the homestead, desert land or allotment laws. Some of these Federal agencies lease their lands, other grant special use permits, and in one case the law provides for sale of agricultural land.

A. Department of Defense Lands

The military departments may lease land under their control if it is not presently needed for public use. The statutory authority for this is section 2667 of Title 10 of

the United States Code (1964). 1/ This statute provides that whenever the Secretary of a military department considers it advantageous to the United States, he may lease land upon such terms as he considers will promote the national defense or be in the public interest. Each lease must provide that the Secretary can revoke it at any time and it cannot be for more than five years, unless the Secretary determines that the inclusion of such terms would not be in the public interest or promote national defense. In any event, the lease must be revocable by the Secretary during a national emergency declared by the President. The law also requires that rentals from such leases be placed in the United States Treasury as miscellaneous receipts and that the interest of the lessee in the leased property may be taxed by state and local governments. 2/

Regulations and procedures have been established by the Department of the Army for leasing real property under the control of the Departments of the Army and the Air Force and the Atomic Energy Commission. 3/ The Department of the Navy has its own regulations, but apparently none of them deal specifically with the leasing of lands for agricultural purposes. As of June 30, 1967, the Army and the Air Force had 751,459 acres leased for agricultural purposes, with more than two-thirds of this land being held by the Army for its civil works projects. The annual rental from the 5,160 leases covering this land was \$2,456,862. 4/

1. Objectives of Leasing Policy

The regulations state that the leasing objectives are to promote the national defense or national economy by making

1/ Act of August 10, 1956, ch. 1041, 70A Stat. 150.

2/ Id.

3/ Department of the Army, Army Regulation (AR) 405-80 August 9, 1965, and Engineers Regulation (ER) 405-1-830 March 24, 1964. Hereafter these regulations will be referred to as either AR or ER.

4/ Figures supplied to Public Land Law Review Commission by the United States Army, Corps of Engineers.

available for private use real property not presently required for governmental use, to provide maintenance of government property by lessees and to secure the maximum cash return to the United States consistent with the achievement of the other objectives. 5/

2. Land Subject to Lease

The Department of the Army generally has two types of land available for leasing: lands within military installations, and lands acquired for civil works projects but not yet being used for such purposes. Lands on military installations which are suitable and presently available for agricultural use can be leased. The regulations require that as agricultural land is acquired for civil works projects it should be leased for farming so that it will stay in production and not be permitted to deteriorate from the encroachment of undesirable vegetation. 6/

The responsibility for determining what land is to be leased is the function of the Army commander, head of the using service or the deputy chief of staff for logistics. 7/ Commanders are required to constantly review the real estate under their jurisdiction to determine whether it is excess to current requirements. 8/ If a commander determines that real property under his jurisdiction should be made available for agricultural use he is required to submit such a recommendation to the appropriate major commander or head of the using service, who may then approve such recommendation, unless it may have a major effect on the use of the installation for military purposes. In such a case the recommendation must be forwarded to the deputy chief of staff for logistics for his approval. 9/

5/ ER 405-1-830, para. 6.

6/ ER 405-1-830, para. 15.

7/ AR 405-80, para. 4.

8/ AR 405-80, para. 3.

9/ AR 405-80, para. 8.

3. Qualifications of Lessees

The regulations prescribe no particular requirement for lessees. Unless otherwise provided, competitive bidding is to be used in awarding leases for agricultural property. ^{10/} However, there are several instances when negotiated leases are permitted. For instance, the district engineer of the Corps of Engineers may at his discretion negotiate a lease with the former owner for agricultural, grazing, or residential purposes for a period not exceeding one year from the date the property was acquired by the United States. ^{11/} The regulations also provide certain preferences for the former owner or tenant, or his surviving spouse. Such a preference is given if any commitment was made for it at the time of the acquisition of the property. Generally, a commitment will be considered to have been made if there was any official announcement that former owners would be given a preference. Such an announcement may have been given by testimony before Congress, by official statements made at public hearings, by information in letters or booklets furnished to owners and tenants prior to acquisition, by statements made in negotiations for acquisition of the land or by provisions in any written agreements. ^{12/}

4. Acreage Limitations

The regulations do not provide any specific acreage limitations on leases. The only language pertaining to the size of units to be leased provides that:

(L)arge land areas available and suitable for agricultural or grazing purposes will be divided into economic agricultural or grazing units, with due consideration being given to average or normal agricultural or grazing units in the locality, and the desirability of including in such units lands of present high productive potential with lands of present low productive

^{10/} ER 405-1-830, para. 20.

^{11/} ER 405-1-830, para. 4.

^{12/} ER 405-1-830, paras. 16a(1) and 20a(1).

potential, as well as the effect of the number of lessees on the administration of security and safety at the installation and the cost of administration of leases. ^{13/}

5. Rental

Unless otherwise specifically provided, the regulations require that the rent in all leases be not less than the appraised fair market rental value of the property being leased. ^{14/} The regulations also provide that leases should not be granted until after a reasonable effort has been made to obtain competitive bidding. The announced purposes of such competition is to afford all qualified persons an equal opportunity to bid for the use of the property, to secure for the Government the benefits which flow from competition and to prevent criticism. ^{15/} Even in those cases where leases may be negotiated directly with the former owners or tenants, the leases must provide for a rental not less than the fair market rental value of the property. ^{16/}

6. Other Terms and Conditions

The regulations and the form leases used by the military provide for a number of other terms and conditions. Many of these are standard lease terms and of no particular concern here. But there are others which deserve some attention.

The regulations provide that except under certain circumstances, leases are to prohibit the cultivation of price supported crops. The exceptions to this policy generally relate to circumstances where commitments were made to former owners and tenants that they would be allowed to continue production of such crops after the land was acquired by the Government. ^{17/}

^{13/} ER 405-1-830, para. 18.

^{14/} ER 405-1-830, para. 9.

^{15/} ER 405-80, para. 3c; ER 405-1-830, para. 20.

^{16/} ER 405-1-830, para. 20a.

^{17/} ER 405-1-830, para. 16; AR 405-80, para. 22.

The regulations also provide for the establishment of land use regulations to assure that the land will be managed under an approved plan. Such regulations become a part of the lease. In leases for two or more years crop rotation plans are included in the use regulations. Other matters covered in the land use regulations are such things as the materials, supplies, or equipment, if any, to be furnished by the Government to the lessee. 18/

Another provision of the regulations requires the lessee to agree not to accept any Federal cost sharing payments for soil conservation practices. The cost of any soil conservation practices required by the land use regulations is supposedly reflected in reduced rental and therefore any subsidy for such work would amount to a duplicate payment. 19/

The standard lease terms also provide that the lessee shall plant, cultivate and harvest crops in accordance with the provisions of the land use regulations, that he will "maintain the property in good condition and free from weeds, brush, washes, and gullies detrimental to efficient farming operations," that he will "cut no timber, conduct no mining operations, remove no sand, gravel, or kindred substances . . . or commit no waste of any kind, or in any manner substantially change the contour or condition of the property" except as required to carry out soil and water conservation measures. 20/

7. Disposition of Improvements if Lease Terminates

As stated above, under most circumstances the lease must permit the Secretary of the military department to revoke it at any time, and in all cases the lease must provide for revocation during a national emergency. Under the regulations when the Government determines that a lease should be revoked, or that the area included within it

18/ ER 405-1-830, para. 19.

19/ ER 405-1-830, para. 27.

20/ Department of the Army Lease, Eng. Form 286, 1 Dec. 62. See Appendix C page C-2 for a copy of this lease form.

should be materially reduced, or that because of military necessity the lessee will be prevented from harvesting or removing his crops, a notice of intention to revoke must be delivered to the lessee. When the lease is revoked, a supplemental agreement will be negotiated with the lessee to provide for adjustment of rentals and compensation for the crops remaining on the land at the time of taking by the Government. 21/

If the lease is not terminated but runs its course, at its expiration the lessee is required to remove his property from the premises and leave them in as good order and condition as they were at the commencement of the lease, normal wear and tear excepted. 22/

B. National Park Service Lands

Under certain circumstances the National Park Service issues revocable special use permits for conforming agricultural uses in areas where it is desired to perpetuate or restore man-made conditions. 23/ The main objectives of the National Park Service leasing policy is to preserve and restore the "historical scene" in parks and historical areas and permittees are expected to be in sympathy with this historical objective.

Permits for agricultural use are generally issued for several years, renewable annually upon payment of an annual fee. Generally, three to five years is the minimum period, with the term of the permit to be determined by the field official issuing it. In no event are the permits to exceed a period of twenty years. 24/

21/ Id. See also ER 405-1-830, para. 28.

22/ See article 18 of lease Appendix C pages C-5,6.

23/ The policies of the National Park Service relating to permits for agricultural uses are set forth in its Land Management Handbook, Section 2, chapter 2, pages 1-4. The information on National Park Service policies was obtained from this source.

24/ See Appendix C page C-8 for copy of the special use permit form.

7
The fee charge for such permits must be at least equal to that normally charged for similar facilities in the local community under the conditions set forth in the permit.

Usually a crop rotation program is worked out with the permittee. The National Park Service tries to foster land use practices that will improve the soil and prevent deterioration.

Special conditions can be included in the permit and often are. Such conditions depend upon the particular area involved.

Figures were not readily obtainable from the National Park Service on the number of acres involved in such permits, but it is estimated that there are approximately 750 permits in existence. These permits cover not only intensive agricultural use of the land but also the production of forage crops. There is no information indicating what percentage of the permits or lands involved are devoted exclusively to intensive agriculture.

C. Department of Agriculture Lands

Under certain conditions agricultural lands under the jurisdiction of the Department of Agriculture may be put to use under permits or sold for homesteads. From 1906 until 1962 there was in existence what was known as the Forest Reserve Homestead Act.^{25/} This act authorized the Secretary of Agriculture, in his discretion, to determine what lands in the national forests, if any, were chiefly valuable for agriculture and could be occupied for that purpose without injury to the forests. Upon making such a determination the Secretary of Agriculture filed a list of such lands with the Secretary of the Interior with a request that they be opened for entry under the homestead laws. This act was repealed in 1962, but lands chiefly valuable for agriculture can still be disposed of by sale.

^{25/} Act of June 11, 1906, ch. 3074, 34 Stat. 233 (repealed, Act of October 23, 1962, P.L. 87-869, sec. 4, 76 Stat. 1157).

1. Sale of Department of Agriculture Lands

Under the Act of March 1, 1911 26/ certain lands under the jurisdiction of the Department of Agriculture that are chiefly valuable for agriculture may be sold. These are lands that have been acquired by the Government, as opposed to original public domain lands. The Secretary of Agriculture:

(M)ay, in his discretion, . . . examine and ascertain the location and extent of such areas as in his opinion may be occupied for agricultural purposes without injury to the forests or to stream flow and which are not needed for public purposes . . . 27/

He may offer these lands for sale to settlers as homesteads at their true value which is to be fixed by the Secretary. These lands are to be sold in tracts not exceeding 80 acres. The Forest Service Manual 28/ states that before any land is recommended for sale every effort should be made to dispose of it by exchange for other land.29/

Under the regulations and policies established by the Secretary of Agriculture any land offered for sale pursuant to this statutory authority must be "accessible to community facilities and so located that use and development for agriculture will not unduly increase the costs of publicly financed facilities or services". Also, the land will be offered for sale for agricultural purposes only if such use will not be contrary to local or state zoning ordinances or other land use restrictions. 30/ The Forest Service Manual

26/ Ch. 186, sec. 10, 36 Stat. 962; 16 U.S.C. sec. 519 (1960).

27/ 16 U.S.C. sec. 519 (1960).

28/ Forest Service, U.S. Dept. of Agriculture, Forest Service Manual. Hereafter cited as FSM.

29/ FSM sec. 5481.1, item 2.

30/ 36 C.F.R. sec. 281.1 (1968).

admits there is no statutory requirement that the land be accessible to community facilities, but it says such factors need to be recognized because they assert a negative influence on other factors. 31/

The regulations also provide that an applicant for purchase of such land must be a resident of the general locality and engaged in agriculture or he must give evidence of his intent to become a settler in the locality for farming purposes. He must be twenty-one years of age or the head of a family and either a citizen of the United States or have declared his intention to become one.32/ The applicant must present evidence that he can meet the requirements of the regulations and that he will use the lands, if he acquires them, for agricultural purposes only.33/

Lands which the Secretary of Agriculture determines may be sold must be appraised to determine their true value. They are to be appraised on the basis of market value under the conditions existing at the time of appraisal. After the appraisal, notice of the proposed sale is given by publication in the county where the lands are situated. Such notice describes the lands and states the minimum acceptable price which is the appraised value.34/ The regulations say that lands may be sold to the highest qualified bidder, but at not less than the appraised value. Conveyance of the land to the successful bidder is made by a quitclaim deed, which may reserve to the United States such timber, minerals, easements, or rights-of-way as the Forest Service finds necessary or desirable and may also be subject to such special conditions as are necessary to protect the national forests.35/

31/ FSM sec. 5481.1, item 2h.

32/ 36 C.F.R. sec. 281.3 (1968).

33/ 36 C.F.R. sec. 281.4 (1968).

34/ 36 C.F.R. secs. 281.5, .7, .8 (1968).

35/ 36 C.F.R. secs. 281.9, 281.10 (1968).

2. Forest Service Use Permits

The Secretary of Agriculture is authorized to make rules and regulations for the occupancy and use of the national forests.^{36/} The Secretary has promulgated such regulations and the Department has established policies and procedures for granting permits to use Forest Service lands for agricultural purposes.^{37/} It is Forest Service practice to authorize such use by the issuance of terminable special use permits, rather than by leasing the land as is the practice of the Department of Defense.^{38/}

a. Land Subject to Lease

The regulations provide that any occupancy and use of national forest land will be permitted only upon compliance with reasonable conditions for the protection and administration of the national forests. Special use permits may be issued by the Chief of the Forest Service or upon his authorization by the regional forester, forest supervisor, or forest ranger. Such permits must be in the form and contain the terms and conditions required by the regulations of the Secretary of Agriculture and the instructions of the Chief of the Forest Service.^{39/}

Any use of the Forest Service land for agricultural purposes must be consistent with the overall management objectives of the Forest Service. All uses are subject to applicable Federal and state laws and local ordinances, as well as to the Department's regulations.^{40/}

^{36/} Act of June 4, 1897. ch. 2 sec. 1, 30 Stat. 35, (codified as amended at 16 U.S.C. sec. 551 (1960)).

^{37/} 36 C.F.R. ch. II, part 251 (1968) Land Uses; FSM, Title 2700, Land Uses Management.

^{38/} See Appendix C page C-12 for copy of special use permit form.

^{39/} 36 C.F.R. secs. 251.1, .25 (1968).

^{40/} FSM secs. 2702-03.

Forest Service policies provide that the permits for agricultural use will be issued only for land "which will serve its highest usefulness growing agricultural products." The types of land which may be included in such permits are:

- a. Lands suitable for cultivation which are adjacent to private lands and can be used in connection therewith.
- b. Arable lands at administrative sites temporarily not needed for administrative purposes.
- c. Areas of arable land a few acres in extent but not of sufficient size to be listable for homestead entry.
- d. Cultivable lands included in areas acquired by purchase, exchange, donation, or transfer.^{41/}

b. Qualifications of Lessees

There are no special provisions in the published regulations and policies pertaining to the qualifications for applicants for agricultural use permits. The general provisions relating to applicants for all types of use permits provide that applicants may be any individuals, corporations, associations, municipalities, or agencies of local or state governments. The qualifications of the applicant are to be considered carefully before approving his application for a special use. Generally, the applicant is required to submit information about his experience and qualifications relating to the proposed use of the land and his financial resources.^{42/}

c. Acreage Limitations

No specific acreage limitations are included in the Forest Service policies, but the manual does state that land being used under any special use permit "shall be suitable for the proposed use and kept as small as is consistent with the intended use".^{43/} The manual also says annual permits may

^{41/} Forest Service Handbook sec. 2713-1.

^{42/} FSM sec. 2712.1.

^{43/} FSM sec. 2703, item 4.

be issued without acreage limitations, but it does not say what, if any, acreage limitations should apply for term permits.^{44/}

d. Rental

The regulations provide that special use permits shall require the payment of a fee or charge commensurate with the value of the use authorized by the permit. The amount of the fee will be prescribed by the Chief of the Forest Service.^{45/} The Forest Service Handbook provides that the minimum fee for an agricultural use permit shall be one dollar per acre per year, but not less than five dollars. Fees are to be computed on a return "from 1/5 to 1/3 of the average market value of the crop produced."^{46/}

The handbook also suggests methods for figuring an equitable fee depending on the quality of the soil, the crops being raised and whether the land is being irrigated or dry farmed. The suggested prices range from a high of \$15.00 per acre per year for small grains raised on good irrigated land to the minimum of \$1.00 per acre per year, which would apply to poor lands being dry farmed and producing a crop of hay. The handbook also provides that if the land is to be used under a crop rotation program where the crop will vary from year to year the fee is to be determined by calculating the annual fee for each different crop and averaging the various annual fees over the term of the permit.^{47/}

The Forest Service Manual contains rather unique provisions regarding waiver of fees for subsistence farmers. Section 2715.44b of the manual says there are tracts within the forests that are suitable for subsistence farming without damage to the land or watershed. It also states:

Often these tracts are not economic farm units, and their occupancy by tenants is

^{44/} FSM sec. 2711.1, item 2.

^{45/} 36 C.F.R. sec. 251.3(a) (1968).

^{46/} Forest Service Handbook sec. 2713-13.

^{47/} Id.

based upon a realization that the occupants have no better place to go and that it is socially sound to allow occupancy. There are other tracts used in connection with subsistence operations where cash income is quite limited. In this situation the unit is not economic, with or without the Government land.^{48/}

Under these conditions the fee can be waived in whole or in part by the officer issuing the permit.

e. Other Terms and Conditions

The special use permit must describe the soil conservation practices to be carried out by the permittee, list the crops which may be grown, and explicitly prohibit the production of price supported crops in surplus supply. The permittee must keep himself informed as to what crops are currently being price supported and if he should cultivate such a crop it may cause his permit to be terminated. However, any crop which he plants prior to its designation as a surplus crop may be harvested.^{49/}

f. Disposition of Improvements if Lease Terminated

When a special use permit is terminated the ownership of any improvements on the land is to be determined by the clauses in the permit. When a permit is revoked or terminated the permittee must be given written notice of a date by which he must remove all structures or improvements and he is to be told if they are not removed by that date they become the property of the United States.^{50/}

While the regulations provide ^{51/} that special use permits may be transferred, the manual states that it is not the policy to do so and that upon the sale or transfer of

^{48/} FSM sec. 2715.44b.

^{49/} Forest Service Handbook secs. 2713-1d, f.

^{50/} FSM sec. 2716.4.

^{51/} 36 C.F.R. sec. 251.1(b) (4) (1968).

the improvements covered by a use permit the permit terminates. A new permit will be issued to the person acquiring the transferred improvements provided that continuation of such special use is desirable.^{52/}

D. Bureau of Reclamation Lands

The Bureau of Reclamation has over nine million acres of land under its jurisdiction. Approximately seven million of these acres were withdrawn from the public domain and the remainder were acquired by purchase, condemnation or donation. The Secretary of the Interior is authorized by statute to lease such lands for periods not exceeding fifty years.^{53/} In 1967 the Bureau of Reclamation had 387 agricultural leases covering 65,726 acres of land. These leases produced an annual revenue of \$857,457.^{54/} The procedures for leasing Bureau land are found in the Reclamation Instructions.^{55/}

1. Land Subject to Lease

The Instructions do not indicate what lands are subject to leasing except to state that no lease shall be issued until there is a determination that the land involved is required for some present or future Bureau use.^{56/} Presumably, if there is no present use for the land and it is not being held for a proposed project, it should be disposed of rather than retained and leased.

^{52/} FSM sec. 2716.1.

^{53/} Act of August 4, 1939, ch. 418, sec. 10, 53 Stat. 1196; (codified at 43 U.S.C. sec. 387 (1964)).

^{54/} Bureau of Reclamation, U.S. Department of the Interior, 1967 Statistical Appendix "Federal Reclamation Projects 1967 Crop Report and Related Data", Tables 8 and 9.

^{55/} Bureau of Reclamation, U.S. Dept. of the Interior, Bureau of Reclamation, Reclamation Instructions (hereafter referred to as Reclamation Instructions) Series 210 Land, Part 215 Land Management, ch. 5 Leases.

^{56/} Reclamation Instructions sec. 215.5.2A.

2. Qualifications of Lessees

Bureau lands can be leased to United States citizens, domestic corporations, or governmental entities. ^{57/} This provision permitting leasing to corporations differs from the policies of some of the other Federal agencies. Preference in leasing is to be given to project water users or local settlers or landowners. This is done by prohibiting bids by persons residing more than a given distance from the particular project. No preference is to be given to the immediate previous lessee if he is not the high bidder, but a former owner of land acquired by purchase or condemnation is to be given a preference in leasing his former land. ^{58/}

3. Acreage Limitations

Unlike some of the other Federal agencies, the Bureau policy prescribes acreage limitations. Agricultural lands to be leased are to be divided into forty-acre tracts. The Instructions state further:

While existing laws do not require that the 160-acre limitation be applied to leasing of lands, it is the policy of the Bureau and the Department to lease agricultural lands on a family unit basis. Agricultural lands for which irrigation water is available shall not be leased in tracts in excess of 160 acres to any one person without the prior approval of the Commissioner. ^{59/}

4. Rental

It is the general policy of the Bureau to award leases to the highest responsible bidder after competitive bidding, but leases may be negotiated when the Regional Director believes it will be in the best interest of the United States. ^{60/} Rentals are to be based on the character of the

^{57/} Reclamation Instructions sec. 215.5.2E.

^{58/} Reclamation Instructions sec. 215.5.6.

^{59/} Reclamation Instructions sec. 215.5.10.

^{60/} Reclamation Instructions sec. 215.5.3.

land and generally are to be comparable to rates charged for similar land in the area. As a rule, leases are not to be executed unless the consideration is at least equal to the Bureau's cost of advertisement or negotiation for the lease. In agricultural leases, if the lease is executed sufficiently early in the season to permit the raising of a crop, a full year's rental is to be charged.^{61/}

5. Other Terms and Conditions

Other terms and conditions to be included in Bureau agricultural leases which are worthy of note are that they shall be for one year periods, preferably on a calendar year basis, with options for renewal for four successive years. Any agricultural lease which has been in effect for five years may not be renewed.^{62/}

Agricultural leases usually are to incorporate recognized soil conservation practices as contract provisions and the lessees are to be required to consult and obtain prior approval for any crops to be planted. Leases must contain a provision restricting the growing of crops in surplus supply.^{63/}

Bureau leases may be assigned with the approval of the Government and upon the payment of a fee to cover the expense caused by the assignment. Also, subleases may be granted when approved.^{64/}

6. Disposition of Improvements if Lease Terminated

Bureau leases may be cancelled by the contracting officer when the interests of the United States require, providing that the termination is done in accordance with the lease provisions. Upon such a termination refunds will be made of any rentals collected but not earned. No provision is made

^{61/} Reclamation Instructions sec. 215.5.22.

^{62/} Reclamation Instructions sec. 215.5.5.

^{63/} Reclamation Instructions secs. 215.5.11,.12.

^{64/} Reclamation Instructions secs. 215.5.16,.17.

in the Instructions or the standard lease form for compensation for any unharvested crop taken over by the Government. ^{65/}

E. Bureau of Sport Fisheries and Wildlife Lands

The Bureau of Sport Fisheries and Wildlife which is a part of the Department of the Interior has jurisdiction over substantial acreage, much of which is included in national wildlife refuges. Because of the need to raise animal feed on some of these lands, the policies of this agency regarding the use of agricultural land differ from those of other Federal agencies, in three important ways. First, instead of providing for cash leases or charging fees for use permits, this Bureau prefers to enter into crop sharing arrangements. Second, the Bureau allows cultivation on lands being devoted to its primary purposes, providing refuges for wildlife; and third, in some instances the Bureau will farm its land with its own personnel.

1. Land Subject to Lease or Agreement

Statutory authority for permitting agricultural use of the Bureau's land is found in 5 U.S.C. sec. 301 (1967) and 16 U.S.C. secs. 668dd and 715i (Supp. 1968).

The Bureau's Wildlife Refuges Manual requires a land use plan be developed for each wildlife refuge program. In doing this, an inventory is to be made of the land capabilities of the refuge. The Manual provides:

The primary wildlife objectives of the refuge, as well as the capability of the land, must be the criteria in determining whether land will be utilized as a wildlife habitat or designated as agricultural, grass, or forest land. Good land use dictates that farming be confined to land in a suitable capability classification. . . . ^{66/}

^{65/} Reclamation Instructions sec. 215.5.18; See Appendix C page C-14 for copy of Bureau form for lease of land for agricultural purposes.

^{66/} Bureau of Sport Fisheries and Wildlife, U.S. Department of the Interior, Wildlife Refuges Manual, sec. 3412; hereafter the manual will be cited as Wildlife Refuges Manual.

The Bureau's policy on farming is set forth as follows:

The management of waterfowl and other forms of wildlife often requires that farm crops be provided on refuges to supplement other available foods. Accordingly, Bureau policy requires that agricultural lands be cropped to the full extent of their capabilities consistent with the maintenance of an ecological balance between croplands, grasslands and timber, and the food and habitat requirements of the wildlife species for which the refuge is managed.^{67/}

The manual also says:

The fundamental requirement of the regulation authorizing cooperative farming is that there shall be a direct or indirect benefit to the wildlife using the refuge.^{68/}

The regional directors of the Bureau have authority to execute contracts for agricultural use of Bureau lands for periods up to five years, provided a land use plan has been approved for the area.^{69/}

2. Qualifications of Lessees

Certain priorities are recognized in determining who will be permitted to farm Bureau land. The manual provides that regardless of any other priority provisions "no person will be selected who is not qualified, willing, and equipped to perform the special requirements needed to accomplish the management objectives".^{70/} Priority is given first to persons who owned land within the refuge at the time the refuge was acquired by the Government and to their surviving

^{67/} Wildlife Refuges Manual sec. 3421.

^{68/} Wildlife Refuges Manual sec. 3414.

^{69/} Wildlife Refuges Manual sec. 3413a.

^{70/} Wildlife Refuges Manual sec. 3413c.

spouses who signed the conveying instrument. This priority does not necessarily apply to the particular lands acquired from the former owner. ^{71/}

While no priorities beyond that given to the former owner or his spouse are expressly recognized, the Bureau does give secondary consideration to persons who were tenants on the land at the time it was acquired and to people residing in the immediate vicinity of the refuge. Bureau policy further provides that no agreement for use of the land will be executed or any permit granted to anyone who does not live in the vicinity of the refuge, if there is an application on file by a former owner or tenant or by someone living in the vicinity. Except in cases where there is to be competitive bidding, the present holder of a permit or agreement has a priority over all other applicants when it is time for renewal, providing he has complied with all the provisions of his present agreement. ^{72/}

3. Acreage Limitations

The Bureau apparently has no defined acreage limitation policies. Its manual says the Bureau endorses the principle of accommodating as many people as feasible in granting rights to use its land rather than permitting a few people to monopolize the land. However, exceptions can be made to this policy if it is clearly in the best interest of the Government to do so. ^{73/}

4. Rental

The rental policies of the Bureau differ most remarkably from those of the other Federal agencies. As indicated, it favors crop sharing arrangements, which it characterizes as cooperative farm agreements. The manual states that cooperative farming or share cropping is encouraged for several reasons: first, because it would be uneconomical for the government to attempt farming on its own to meet food requirements for wildlife; ^{74/} second, it is a suitable means

^{71/} Wildlife Refuges Manual sec. 3413c(1).

^{72/} Id.

^{73/} Id.

^{74/} However, as will be discussed later, the Bureau sometimes does attempt farming on its own.

of supplementing basic refuge production as well as keeping farm lands under control until they are retired to permanent cover; and third, the Bureau sometimes feels it has a moral obligation to former owners to permit cooperative farming.^{75/} The manual also says that "cash farming is not normally an acceptable practice and should be avoided".^{76/} However, the Bureau does recognize that at times cash farming may be the only acceptable means for keeping fields in production.

The type of crops usually permitted to be grown under cooperative farming agreements are small grains which are suitable for wildlife food. The cooperative agreement should clearly state the shares of the crop which are to belong to the Bureau and to the farmer.^{77/}

The law provides that the terms and conditions to be included in any farm agreement shall be those that the Secretary of the Interior determines to be for the best interest of the Government. The Secretary has provided by regulation that fees and charges for privileges on wildlife refuge areas:

(S)hall be set at a rate commensurate with fees and charges for similar privileges and products made by private land owners in the vicinity or in accordance with their local value. Fees or rates of charge for products and privileges may be based either on a monetary exchange or on a share in kind of the resource or produce.^{78/}

The Bureau manual provides that farm operators or permittees may be selected on the basis of the highest bid with formal or informal bid procedures.^{79/} However, because of the preferences mentioned above and the requirement that no

^{75/} Wildlife Refuges Manual sec. 3422.

^{76/} Id.

^{77/} Wildlife Refuges Manual sec. 3414.

^{78/} 50 C.F.R. sec. 29.5 (1968). See also, Wildlife Refuges Manual sec. 3413b.

^{79/} Wildlife Refuges Manual sec. 3413c(3).

one will be selected to farm Bureau land who is not qualified, willing or equipped to do so, it is more likely that a negotiated arrangement will be entered into rather than one based on competitive bidding.

5. Other Terms and Conditions

The usual cooperative farming agreement will provide a complete crop rotation program specifying the crops to be planted in each year.^{80/} All farming operations are to be by accepted methods designed to prevent soil erosion and retention of soil fertility.^{81/}

There are no provisions in the manual expressly prohibiting the raising of price supported crops. Very often such crops will be raised because they are the type that provide desirable wildlife food. By inference the manual recognizes that surplus crops may often be grown on Bureau land because it provides that under no circumstances will the refuge's share of such crops be sold on the market contrary to prevailing federal policies.^{82/}

There are no stated Bureau policies concerning the disposition of improvements if the permit or agreement is terminated. The absence of such provisions is understandable. Unlike other Federal agencies, the Bureau of Sport Fisheries and Wildlife is not likely to want to terminate a farming operation prematurely. It is usually a sharer of the crop and therefore, it has an interest in seeing that the crop is grown. Also, the primary objective in permitting farming on the land is to assist in wildlife management programs and not simply to obtain revenue from lands that are temporarily surplus to the Federal needs.

6. Bureau Farming Operations

In addition to permitting others to farm its land, the Bureau may engage in farming by use of its own personnel.

^{80/} Wildlife Refuges Manual sec. 3414.

^{81/} Wildlife Refuges Manual sec. 3422.

^{82/} Id.

The manual provides:

Care should be exercised to perform as a Bureau activity only those operations essential to the successful accomplishment of the primary mission and to make available to the refuge neighbors to the fullest extent possible the surplus refuge products and privileges. 83/

When the Bureau does engage in farming operations on its own it is required to observe all state laws and regulations, particularly those regarding such matters as purity of seed, weed control, use of insecticides and herbicides. 84/ This feature of Bureau policy, engaging in farming on its own, is quite unique and according to the laws, regulations and policies governing them, it is not followed by any of the other agencies considered in this report.

F. Bureau of Land Management - Lower Colorado River Lands

A rather unique form of use of Federal lands for agricultural purposes occurs along the lower Colorado River. These are lands that were largely withdrawn from the public domain by the Bureau of Reclamation for reclamation projects. Over the years, private and corporate individuals have been using these lands for various purposes without authority. They were legally trespassers. These illegal and unauthorized practices continued for many years until finally, they were brought to the attention of Washington and a decision was made to attempt to remove the illegal occupants through court proceedings. This approach proved to be extremely unpopular, time consuming and costly. As an alternative to this solution the Secretary of the Interior developed a program designed to gradually change the status of the occupants from trespassers to permittees. Under this program the occupants were encouraged to make application for permits to remain on the land. The original permit forms were for five year periods, but at the present time permits are issued on a year to year basis. 85/

83/ Wildlife Refuges Manual sec. 3416.

84/ Id.

85/ Copies of the application and permit forms are included in the Appendix C at pages C-18 to C-26

Under the present policies the permittee is required to pay an annual rental for the use of the land. If he is an agriculture permittee his permit contains a provision that his use of Colorado River water may be terminated upon thirty days notice. Also, his permit can be terminated upon ninety days notice. Other provisions of the permit provide that the maximum arable acreage within the permit area for which Colorado River water may be used is 160 acres for each single applicant and 320 acres for a man and his wife. At the present time there are 92 permits outstanding which permit the cultivation of 5,603 acres. In addition, there are some 8,600 acres of land still being used for agricultural purposes, which are not under permit. These continue to be illegal or unpermitted occupancies. However, the Bureau of Land Management is attempting to get these occupants to comply with the application and permit procedures so that their uses will cease to be without legal right.

CHAPTER 8

A COMPARATIVE REVIEW OF LAWS PROVIDING FOR THE DISPOSAL OR LEASE OF AGRICULTURAL LANDS BY VARIOUS STATES

A. The Carey Act

1. The Federal Law

In 1894 Congress adopted what is commonly known as The Carey Act. 1/ This act authorizes and empowers the Secretary of the Interior to grant and patent up to 1,000,000 acres of land to each of the thirteen states to which the desert land laws apply. 2/ An amendment to the Carey Act permits the granting of an additional 1,000,000 acres to the states of Colorado, Idaho, Nevada, and Wyoming. 3/

The act provides that land can be granted up to these maximum quantities, provided the states cause all of the land to be irrigated, reclaimed and occupied and at least twenty acres of each 160-acre tract to be cultivated by actual settlers. These requirements are to be met "as thoroughly as is required of citizens who make entry under the . . . desert land law" 4/ From the date of approval of their applications for segregation of such land, the states have ten years in which to complete these requirements, with the possibility of a five year extension. If the land is not reclaimed and settled within that time, it returns to the Federal public domain. 5/

1/ Act of August 18, 1894, ch. 301, 28 Stat. 422 (codified as amended at 43 U.S.C. sec. 641 et seq. (1964)).

2/ 43 U.S.C. sec. 641 (1964). For a list of these thirteen states see Chapter 3, p.112

3/ 43 U.S.C. sec 645 (1964).

4/ 43 U.S.C. sec.641 (1964).

5/ Id.

2. State Implementation Statutes

In order to carry out the Carey Act provisions and to establish procedures for the settlement and reclamation of Carey Act lands, all of the desert land states, with the exception of California and Montana, currently have implementation statutes in force.

a. Development of Irrigation Systems

Most of the states have not become directly involved in the construction and operation of the irrigation works necessary to reclaim Carey Act lands. Instead, the typical pattern is for private individuals or corporations to approach the state agency responsible for administration of the Carey Act program with a proposed plan of development. 6/ This individual or group will request the state to apply to the Federal government for a tract of land under the Carey Act, and will simultaneously submit plans for an irrigation system with which to reclaim the requested tract. If the plan is feasible and the sponsoring group is financially responsible, the state will apply to the Federal Government for segregation of the tract of land and will enter into a contract with the developers to insure the prompt and satisfactory completion of the proposed irrigation system. Upon completion of the required irrigation works, the tract is opened to settlement and the developer recovers his investment by acting as the sole purveyor of water within the project area.

This is the general procedure followed in most of the states studied. However, some variations do occur, and some of the provisions should be discussed in more detail. In Oregon the application to the Federal Government to select Carey Act lands must be filed at the expense of those who plan to develop the irrigation system. 7/ However, Oregon law also authorizes the state engineer to select a tract of public domain land, carry out the necessary preliminary work, and let a contract to the lowest bidder for development of the selected tract. 8/ In addition, Oregon requires that

6/ See, for example, Colo. Rev. Stat. Ann. sec. 112-2-7 (1963); Rev. Code of Wash. Ann. sec.79.48.040 (1962).

7/ Ore. Rev. Stat. sec. 555.050 (1955).

8/ Ore. Rev. Stat. sec. 555.050(2) (1955).

within ten years after the completion of the irrigation system, control and management of the works must pass from the contractor to the water purchasers to the extent of the water rights sold. 9/ This is the only state provision found which specifically requires the contractor to completely divest himself of all interest in the project after its completion. However, in Idaho, nonowner controlled water companies are regulated by the Idaho Department of Reclamation.10/

The Nevada statute is a good example of the requirements and conditions which most of the states place upon the irrigation system developer. The statute requires that construction begin within six months after approval of the project and be prosecuted diligently and continuously to completion.11/ Further, the contract between the developer and the state must include complete plans and specifications; the price, conditions and terms per acre at which the works and perpetual water rights shall be sold to settlers; and the price per acre which the state will charge settlers.12/ Nevada, and several of the states, also require the developer to furnish a faithful performance bond which will be forfeited if he fails to carry out the terms of the contract. 13/

b. Qualifications of Entrymen

The Federal law does not establish the requirements for entrymen on Carey Act lands. However, the states have generally modeled their requirements after other Federal laws, such as the homestead laws. Usually, the states require that the applicant for entry be twenty-one years of age and a citizen of the United States or one who has filed his declaration

9/ Ore. Rev. Stat. sec. 555.080 (1955).

10/ Idaho Code Ann. sec. 42-2101 (1948)

11/ Nev. Rev. Stat. sec. 324.170 (1967).

12/ Nev. Rev. Stat. sec. 321.160 (1967)

13/ Nev. Rev. Stat. sec. 324.170 (1967). See also Wyo. Stat. Ann. sec. 36-100 (1957); Idaho Code Ann. sec. 42-2004 (1948).

to become a citizen of the United States.14/

The status of married women is the one area where there is significant variation from state to state. In Idaho married women are denied the right to make entry.15/ Washington has adopted the Federal homestead rule, which permits entry by married women only if they are the head of a family.16/ In Nevada married women are expressly authorized to make entry.17/ Most of the state statutes, however, are silent on the subject, and since most of them require only that the entryman be a citizen over twenty-one years of age, it would appear that married women may make entry in these states.

c. Acreage Limitations

Federal law establishes the maximum acreage which may be entered by any one individual at 160. The states have no authority to allow the entry of a greater amount, and their statutory provisions are, therefore, very general, merely stating that the entryman may apply for up to 160 acres.18/ Most of the state statutes are silent as to whether a Carey Act entryman exhausts his right by a single entry of less than 160 acres. However, the State of Wyoming has enacted a provision which permits individuals to make more than one entry as long as the total of all entries does not exceed 160 acres.19/

14/ See for example, Wyo. Stat. Ann. sec. 36-109 (1957); N.M. Stat. Ann. sec. 7-4-17 (1966).

15/ Idaho Code Ann. sec. 42-2014 (1948).

16/ Rev. Code of Wash. Ann. sec. 79.48.130 (1962)

17/ Nev. Rev. Stat. sec. 324.220 (1967).

18/ See, for example, Idaho Code Ann. sec. 43-2014 (1948).

19/ Wyo. Stat. Ann. sec. 36-109 (1957).

d. Price

Federal law does not establish a minimum or maximum sale price for Carey Act lands or require the states to charge the entryman for the acreage entered. However, all of the states have established sale prices in order to derive some revenue from the program. The most common price charged is fifty cents per acre.^{20/} Some of the statutes grant administrative discretion to those managing the program. Nevada permits the price to be set at not less than fifty cents nor more than one dollar per acre, depending on the location and character of the land and climatic conditions.^{21/} In Oregon, the entry cost is one dollar per acre.^{22/} The payment provision in the Oregon statute is unusual in that the price is not paid by the entryman, but by the irrigation system developer out of the first payment made by the entryman under the water supply and repayment contract.^{23/} The Utah statute states that the price per acre may not exceed one dollar, thereby, inferring that it can be less.^{24/} Washington has established the highest minimum price, by requiring that the state receive at least \$10.00 per acre.^{25/}

e. Reclamation and Settlement Requirements

The Federal statute requires that the entryman irrigate, reclaim, occupy, and cultivate the land as thoroughly as is required of those who enter under the desert land laws.^{26/}

^{20/} See, for example, Col. Rev. Stat. Ann. sec. 112-2-18 (1963); Idaho Code Ann. sec. 42-2014 (1948); Wyo. Stat. Ann. sec. 36-107 (1957).

^{21/} Nev. Rev. Stat. sec. 324.080 (1967).

^{22/} Ore. Rev. Stat. sec. 555.130 (1955).

^{23/} Id.

^{24/} Utah Code Ann. sec. 65-3-11 (1968).

^{25/} Rev. Code of Wash. Ann. sec. 79-48-130 (1962).

^{26/} 43 U.S.C. sec. 641 (1964).

To implement this requirement the states have adopted occupation, reclamation and cultivation requirements. The states have interpreted the Federal provision as establishing only a minimum which may be exceeded. Therefore, some of them have adopted more stringent requirements than those required by the desert land laws. For example, Wyoming requires the entryman to make final proof within three years by showing that the land has been reclaimed, settled and occupied and that one-quarter of the irrigable area, including not less than one-eighth of the total area, of the entry has been cultivated and irrigated.^{27/} The Wyoming statute also states that the entryman must reside on the entry for a period of time established by regulation.^{28/}

In Idaho, the settler must cultivate and reclaim one-sixteenth of his entry within one year after receiving notice that the irrigation works are complete. Within two years, one-eighth of the entry must be irrigated and cultivated, and final proof must be made by the end of the third year.^{29/} The New Mexico statute is almost identical to that of Idaho except that the entryman is given only one year within which to cultivate one-eighth of the entry and two years within which to file final proof.^{30/}

As stated before, the Carey Act requires that the lands be irrigated, reclaimed and occupied, and that not less than twenty acres of each 160-acre tract be cultivated by actual settlers, as thoroughly as is required of citizens who may enter under the desert land laws. This provision is somewhat confusing since it uses the terms "occupied" and "actual settlers" in spite of the fact that the desert land laws do not require occupation or residence on the land.^{31/} If

^{27/} Wyo. Stat. Ann. sec. 36-110 (1957).

^{28/} Id.

^{29/} Idaho Code Ann. sec. 42-2019 (1948).

^{30/} N.M. Stat. Ann. sec. 7-4-19 (1966).

^{31/} See discussion Chapter 3, pp. 132-33

the Carey Act can be interpreted to require occupation of the land only to the extent required by the desert land laws, the states do not need to require residence on Carey Act entries.

An examination of the various state statutes, however, indicates that all the states require some form of occupation and residence on the entry. For example, the Idaho statute echoes the language of the Federal provision and requires that final proof include proof of settlement and actual occupation. However, this statutory language is very vague and does not require that residency be established within any particular period after entry or provide a minimum length of time during which residence must be maintained.^{32/} The New Mexico, Wyoming, Nevada, Washington and Colorado statutes are nearly identical to that of Idaho, containing the same vague language. ^{33/} Therefore, while it can be said that some residence is required in all states, the type and duration is unclear from an examination of the statutes.

f. Issuance of Patent

Upon successful irrigation, reclamation and occupation of the land, a patent is issued from the Federal Government to the state.^{34/} The state in turn passes title to the entryman. Once the patent is issued the entryman is free from any further Carey Act requirements, state or Federal.

B. Agricultural Land Laws of the
Eleven Western States

Other than the Carey Act provisions discussed above, none of the eleven western states of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming have laws similar to the Federal acts providing

^{32/} Idaho Code Ann. sec. 42-2019 (1948).

^{33/} N.M. Stat. Ann. sec. 7-4-19 (1966); Wyo. Stat. Ann. sec. 36-110 (1957); Nev. Rev. Stat. sec. 324.230 (1967); Rev. Code of Wash. Ann. sec. 79.48.150 (1962); Colo. Rev. Stat. Ann. sec. 112-2-20 (1963).

^{34/} 43 U.S.C. sec. 641 (1964).

for disposal of agricultural land for less than its appraised value. These states, with minor exceptions, have enacted general sale and lease provisions which apply to all public lands capable of use or development for nonmineral purposes. The sale and leasing of mineral lands are usually covered by special, separate statutes which are beyond the scope of this study. The sale and leasing laws of the eleven western states have been examined, and what follows is a limited description of the variety of laws and policies in effect in these states. Rather than enumerate these laws, state by state, the differences are discussed by subject.^{35/}

1. Appraisal and Classification Requirements

To provide for the orderly disposition of state public lands, most of the eleven states studied have either constitutional or statutory provisions requiring that all public lands be appraised and classified. These two terms should be distinguished. Appraisals are carried out to insure that the state receives the fair market value for any lease or sale. The purpose of classification is to insure that the land is disposed of for its highest and best use.

Constitutionally, the approach may be general or very specific. The Wyoming Constitution, for example, merely recites that state lands shall be disposed of after having been duly appraised by the land commissioners.^{36/} In contrast, the Montana Constitution is much more detailed and requires that the lands not only be appraised but also be classified as (1) valuable for grazing, (2) principally valuable for timber, (3) agricultural lands, or (4) within a town or within 3 miles of a town.^{37/}

While some of the states, such as Wyoming, provide for

^{35/} The textual material and footnote citations in this chapter are not meant to be an exhaustive discussion and listing of every state law studied. In general, only representative samples of the law in each area researched are discussed, along with any significant variations discovered. For a complete list of the state statutes in the areas investigated, see Appendix E pp. E-1 to E-4.

^{36/} Wyo. Const. art. 18 sec. 1 (1890).

^{37/} Mont. Const. art. XVII sec. 1 (1889).

a continuing program of classifications and appraisals, 38/ other states carry out classifications and appraisals only when a request for lease or sale has been made.39/ The Idaho procedure represents an interesting combination of the two approaches. Classification and appraisal may be carried out on motion of the board of land commissioners, in which case a fee of five cents per acre may be added to the price of the land when sold. The board will also classify and appraise land on request, in which case it may require that the costs involved be paid in advance by the applicant.40/

Although appraisal is required by statute or constitution in all of the states before any land may be disposed of, classification is not. However, even when the statutes do not require classification, the effect of other state laws makes classification a necessity. For example, as will be more fully discussed later, in California, agricultural land may be sold only to actual settlers. Therefore it is always necessary to ascertain what is agricultural land. Further, all the states have special mineral leasing provisions, which means that the mineral lands must be defined and segregated.

As noted above, the Montana Constitution requires classification into specific categories. The California statutory provisions are not mandatory but merely permit the state lands commission to classify any or all state lands for its different possible uses.41/ The Utah law says that the land shall be classified: "(A)ccording to the following classification: agricultural, grazing, timber, reservoir sites, natural gas producing, mineral, coal, stone, saline or arid lands. . . ." 42/

38/ Wyo. Stat. Ann. sec. 36-18 (1957). See also, Colo. Rev. Stat. Ann. sec. 112-3-8 (1963).

39/ See, for example, Cal. Public Resources Code sec. 6502 (1968).

40/ Idaho Code Ann. sec. 58-301 (1948).

41/ Cal. Public Resources Code sec. 6201 (1968).

42/ Utah Code Ann. sec. 65-1-28 (1968).

2. Sale of State Land

All of the states studied have enacted statutory provisions for the sale of public lands. Generally, however, the sales statutes are not specifically designed to encourage agricultural development and the sale procedures are uniform irrespective of the type of land being sold. Further, the sales statutes are not intended to provide a subsidy for agriculture, as the land must be sold at prices related to the appraised fair market value.

a. Eligible Purchasers

Since the states are to receive the fair market value for the sale of public lands and no subsidy is intended, the eligibility requirements are generally not strict. Most of the states merely require that the purchaser be a United States citizen or have declared his intention to become such.43/ Some of these statutes particularly require that purchasers have attained the age of eighteen years, 44/ and one, Montana, requires them to be at least twenty-one years of age. 45/ Even in those states which do not specifically provide that the purchaser must have reached a given age, it must be assumed that some age restriction does exist; otherwise the prospective purchaser might not have contractual capacity.

The State of Washington recently amended its purchaser qualification statute. Previously the statute required the purchaser to be a citizen or one who has declared his intention to become a citizen. However, in 1967 the language was changed so that "any person" may purchase or lease property.46/

43/ Idaho Code Ann. sec. 58-313 (Supp., 1967); Colo. Rev. Stat. Ann. sec. 112-3-25 (1963).

44/ Ariz. Rev. Stat. Ann. sec. 37-231(B) (1956); Ore. Rev. Stat. sec. 273.255 (1967).

45/ Rev. Codes of Mont. Ann. sec. 81-908 (1966).

46/ Rev. Code of Wash. Ann. sec. 79.01.088 (Supp., 1968).

In a number of the states studied, corporations are eligible to purchase lands.^{47/} In those states where the statute merely authorizes "citizens" or "persons" to purchase, the status of corporations is determined by the state's definition of these terms. For example, in Washington the term person is statutorily defined to include public and private corporations.^{48/}

One state, California, has established special requirements for purchasers of agricultural land. The California Constitution contains the following provision:

Lands belonging to this State, which are suitable for cultivation, shall be granted only to actual settlers, and in quantities not exceeding 320 acres to each settler, under such conditions as shall be prescribed by law.^{49/}

Pursuant to this constitutional provision, a California statute requires the applicant for purchase of agricultural lands to have resided in good faith on the land for not less than one year, to the exclusion of any other residence.^{50/}

This constitutional provision and the implementing statute are not as broad as a quick reading would lead one to believe. The term "suitable for cultivation" has been defined as any smallest legal subdivision if not less than one-half of its area will, without artificial irrigation, by the ordinary process of tillage, produce ordinary agricultural crops in average quantities.^{51/} Since there

^{47/} Colo. Rev. Stat. Ann. sec. 112-3-25 (1963); Utah Code Ann. sec. 65-1-29 (1968); Rev. Codes of Mont. Ann. sec. 81-908 (1966).

^{48/} Rev. Code of Wash. Ann. sec. 1.16.080 (1962).

^{49/} Cal. Const. art. 17, sec. 3 (1879).

^{50/} Cal. Public Resources Code sec. 7353 (1968).

^{51/} Cal. Public Resources Code sec. 7357 (1968).

is little, if any, state land within California which may be cultivated without irrigation, the constitutional provision has little impact today.

b. Minimum Prices

As was noted earlier, the states generally require that lands be appraised before any sale or lease is consummated. An appraisal is necessary since most of the states require that at least the appraised value be received for lands sold.^{52/} Many of the states also require that a minimum price be received for land irrespective of its appraised value, and often this minimum price will vary according to the type of land being sold. In Idaho, state school lands must be sold for at least \$10.00 per acre; however, no similar provision establishes a minimum price for non-school lands.^{53/} In Montana, agricultural land may not be sold for less than \$10.00 per acre, while grazing land must be sold for a minimum of \$5.00 per acre.^{54/} In Arizona, the minimum price is \$3.00 per acre except when the land is within the service area of a Federal reclamation project, in which case the minimum price is \$25.00 per acre.^{55/}

The Wyoming Constitution authorizes a unique minimum sale price. Like most of the other states, the land must be appraised prior to sale and must be sold at public auction. However, the constitution only requires that the land be sold at not less than \$10 per acre.^{56/} Until 1961, Wyoming statutory law echoed the constitutional language. However, in that year, the Wyoming legislature, interpreting the constitution as establishing a floor price below which state land could not

^{52/} See, for example, Utah Code Ann. sec. 65-1-29 (1968); Rev. Codes of Mont. Ann. sec. 81-912 (1966).

^{53/} Idaho Code Ann. sec. 58-313 (1948).

^{54/} Rev. Codes of Mont. Ann. sec. 81-912 (1966).

^{55/} Ariz. Const. art. X, sec. 5 (1910).

^{56/} Wyo. Const. art. 18 sec. 1 (1889).

be sold, statutorily raised the minimum price to full appraised value.^{57/}

Not all of the states specifically require that fair market value be received for the land. In Colorado the constitution requires that lands be sold in such a manner as will secure the maximum possible amount therefor.^{58/} In California, determination of price is left to the discretion of the state lands commission.^{59/}

c. Acreage Limitations

Although the states have adopted similar procedures for the sale of state lands, there is no uniformity on the question of how much acreage may be purchased by one individual. Several states have no acreage limitation, apparently on the theory that since no state subsidy is being granted by way of a reduction in price, no limitation is necessary.^{60/}

The other states have widely varying acreage limitations which often differ within a state depending on the kind of land involved. In Utah, an individual or corporation may purchase a maximum of 160 acres of irrigated land or four sections of arid or grazing lands.^{61/} In Washington, an individual or corporation may purchase up to one section of land, provided that such area not include more than 160 acres of irrigable land.^{62/} In Oregon, the statute defines types of state land, such as school lands, indemnity lands, university

^{57/} Wyo. Stat. Ann. sec. 36-182 (1961).

^{58/} Colo. Const. art. IX sec. 10 (1876).

^{59/} Cal. Public Resources Code secs. 7301 and 7352 (1956).

^{60/} The following states appear to have no constitutional or statutory acreage limitations: Wyoming, California (except as regards lands suitable for agricultural use, in which case there is a limitation of 320 acres), and Colorado.

^{61/} Utah Code Ann. sec. 65-1-29 (1968).

^{62/} Rev. Code of Wash. Ann. sec. 81-908.

lands and swamp and overflow lands.^{63/} The acreage limitation provision then states that eligible individuals may apply to purchase not more than 640 acres of each of the various types of state lands.^{64/} The word "each" appears to indicate that he may purchase 640 acres of school lands, 640 acres of indemnity lands, and so forth, thereby permitting an individual to obtain substantial acreage.

A number of states have special acreage limitation provisions which apply when the land is within the service area of a Federal reclamation project. For example, in Montana, all lands within a Federal reclamation project must be sold in conformity with established farm unit classifications.^{65/}

3. Leasing of State Lands

All of the states studied have laws governing the leasing of state owned lands. Generally, the lands can be leased for agriculture, grazing, recreation and other similar nonmineral purposes. Mineral exploration leases are handled under separate statutory procedures which are beyond the scope of this study.

Most of the state constitutions do not specifically deal with the question of leasing. As a rule, terms such as "disposed" are used in the constitutions in a general sense and have been interpreted to refer to all types of land conveyances including leases.^{66/} The Arizona Constitution, in contrast, states that the state and school lands shall be sold or leased to the highest and best bidder at public

^{63/} Ore. Rev. Stat. sec. 273.251 (1967).

^{64/} Ore. Rev. Stat. sec. 273.271 (1967).

^{65/} Rev. Codes of Mont. Ann. sec. 81-906 (1966). See also, Ore. Rev. Stat. sec. 541-230 (1967) and N.M. Stat. Ann. Sec. 7-8-27 (1966). For a discussion of reclamation farm unit classifications, see Chapter 2 pp. 92-94, supra.

^{66/} See, for example, Wyo. Const. art. 18 sec. 1 (1889); Utah Const. art. XX sec. 1 (1895).

auction held in the county seat of the county where the lands or a major portion thereof are located. ^{67/} This is one of a minority of constitutions which specifically refers to leases and requires them to be handled in a certain manner.

The various state statutes on leasing are similar and are designed to insure that the states receive the fair market rental value of the property in question. To implement this goal, an appraisal is usually required.

Two types of lease systems are used in the states studied, negotiated leases and leases by competitive bid. Whether lease agreements can be negotiated or whether they must be awarded through competitive bids, depends on the statutes in each state. Only Arizona constitutionally requires leases to be made pursuant to public bids, but numerous state statutes also require such a procedure. The Washington code provision states:

The commissioner of public lands shall be authorized to lease, for a term of ten years or less, to the highest bidder at public auction, any state lands, for any purposes, except mining of valuable minerals . . . , but such lands shall not be leased for less than the appraised rental value thereof, nor shall agricultural lands be leased for less than ten cents per acre. ^{68/}

In contrast, the California laws do not require that leases be awarded pursuant to competitive bidding but allow the state lands commission to negotiate the terms with private individuals. ^{69/}

The Idaho rule is a hybrid of the two approaches discussed above. A lease may be negotiated; however, if more than one person applies for the lease, competitive bidding is required. ^{70/}

Most states require that the fair market rental value of the land be received. Some states also require that a minimum rental be received in all circumstances. Montana, however, has an unusual provision. It leases agricultural land on a crop rental basis. The established rent is one

^{67/} Ariz. Const. art. X sec. 3 (1910).

^{68/} Rev. Code of Wash. Ann. sec. 79.01.244 (1962).

^{69/} Cal. Public Resources Code sec. 6501 et seq. (1968).

^{70/} Idaho Code Ann. sec. 58-310 (Supp., 1967).

quarter of the annual crop, or the usual crop rental practice in the district where the land is located, whichever is greater. ^{71/}

The maximum lease term varies widely from state to state, and is not always statutorily prescribed. In New Mexico the maximum lease term is five years. ^{72/} In Montana, the term can be either five or ten years. ^{73/} Utah permits agricultural leases for a term of up to forty-nine years. ^{74/} The longest term permitted by statute is found in Oregon, which permits leases for up to ninety-nine years. ^{75/} In contrast to these fairly specific statutory limitations, the Nevada leasing provisions are quite short and very broad. The code states that leases may be granted for such a term as the Director of the Department of Conservation and Natural Resources may determine reasonable. ^{76/} The requirements for lessees are generally the same as the requirements for purchasers of state lands.

C. Conclusion

A comparison of the state and Federal disposal practices shows a marked difference in philosophy and procedure. The Federal Government has adopted a policy of cheap or free land to encourage settlement of the western states. The states, on the other hand, have used their public lands as a source of revenue and have uniformly required that fair market value be received for all land transactions. The states have not used their land resources as a device to encourage the use of land for intensive agricultural purposes.

In contrast to the disposal practices, there is a great deal of similarity in the state and Federal laws and policies relating to the leasing of agricultural land. By and large most of such land is leased at full rental value to whomever will pay the price.

^{71/} Rev. Codes of Mont. Ann. sec. 81-402 (1966).

^{72/} N.M. Stat. Ann. sec. 7-8-31 (1966).

^{73/} Rev. Codes of Mont. Ann. sec. 81-407 (1966). See also Rev. Code of Wash. Ann. sec. 79.01.096 (Supp., 1968) (Maximum term, 10 years).

^{74/} Utah Code Ann. sec. 65-1-108 (1953).

^{75/} Ore. Rev. Stat. sec. 271.310 (1967).

^{76/} Nev. Rev. Stat. sec. 322.060 (1967).

PART III
PROBLEMS AND ALTERNATIVES

CHAPTER 9

PROBLEM AREAS

The public land laws analyzed in the first part of this report were enacted, for the most part, many years ago. They originated in a different era and were designed to meet problems the nation no longer faces. The question is have they become obsolete. Since their passage technology has revolutionized the American way of life. Travel is swift, markets are close, the productivity per worker has increased many-fold. The nation has shifted from rural to urban in complexion, and the average size of farms has increased substantially. Agriculture is no longer a way of life to most Americans. It is a business.

Approximately 300,000,000 acres have been settled under the provisions of the agricultural land laws since their passage. Naturally, the most desirable lands were settled first and those least suitable to agriculture are left. While at one time homestead entries averaged almost 40,000 a year, less than 200 final entries were approved in each of the last six years. Some years it has been less than 100, and most of these have been in Alaska.^{1/} Indian allotments have virtually become a thing of the past, and except in Idaho and Nevada very few desert land entries are being approved these days. In short, not much public land is being disposed of for agricultural use. Is this because there is not much agricultural land available? Or is it because the land laws no longer work? An affirmative answer to either question is evidence that the present system of laws and policies may be obsolete and need changing.

Before considering any alternatives to the present system, consideration should be given to some of the problems revealed by the analysis of the existing laws and policies. But even before that, consideration should be given to certain fundamental policy matters. For instance, are the original purposes of the agricultural land laws still desirable objectives in the last third of the twentieth century? Presumably the primary purposes of these laws were to encourage family farming and the settlement of the interior western parts of our country. Today there are slightly over 700,000,000 acres of public domain remaining, almost 99% of which is located in the eleven western

^{1/} Bureau of Land Management, Department of the Interior, Public Land Statistics, 1967, Table 21 at 52.

states and Alaska, with one half of this amount being in Alaska. Much of this land has been withdrawn for various purposes which are incompatible with any use of the land for agricultural purposes. Is settlement of the land that has not been withdrawn necessary or desirable? Certainly there is no longer any need to "win the West". Whether there is any need to increase agricultural production in America is a matter of debate. Population growth is increasing the need for agricultural products, but at the same time our growing affluence is increasing the pressure for preserving our open spaces for recreation and relaxation. If the conclusion is that we do need to increase agricultural production, there is the question of whether this can best be done by encouraging the development of more family farms.

Other policy questions that should be answered before consideration is given to specific problems and alternatives are: Should the objective of the agricultural land laws be to dispose of all the remaining agricultural land? If so, should the Government try to obtain the maximum return for its land? Should the agricultural land laws be used as a device for controlling agricultural production, or for controlling the use of water? Should the objective of the disposal laws be to promote the most efficient use of agricultural land or to give the maximum number of people a share of land? Only after some determination has been made on what the objectives of the land laws should be can intelligent consideration be given to the specific problems that warrant particular attention.

For convenience of discussion these specific problems have been grouped into several categories.

A. Classification Problems

Today before anyone can make a homestead, desert land or Indian allotment entry, the land sought must be classified as valuable or suitable for agricultural purposes. The Secretary of the Interior is given authority to make such classifications by section 7 of the Taylor Grazing Act ^{2/}

^{2/} 43 U.S.C. sec. 315f (1964).

and the Classification and Multiple Use Act of 1964. ^{3/} This requirement that lands be classified before they can be entered or disposed of presents several problems.

First, the Classification and Multiple Use Act of 1964 is an interim measure. It grants the Secretary of the Interior the authority to develop criteria for classifying lands. It also directs him to review the public lands, in the light of the criteria developed, and determine which lands should be classified as suitable for disposal and which should be retained. This authority is scheduled to expire six months after the Public Land Law Review Commission submits its final report to Congress.

Consideration should be given to whether this authority should be made permanent. If such authority is not continued, what will be the effect of the criteria developed by the Secretary under the 1964 Act? One answer is that the Secretary can continue to follow the same criteria when making classifications pursuant to the authority given to him by the Taylor Grazing Act. But this interpretation is tantamount to saying that the 1964 Act gave the Secretary no authority he did not already possess by virtue of the Taylor Grazing Act. If that is correct interpretation of the law, why did Congress pass the 1964 classification provisions and why did it provide that the Secretary's authority would end at a certain time? Rather than allowing this matter to be open to speculation, if the 1964 Classification Act is not made permanent, at least the effect of its expiration should be expressly spelled out.

Another area of classification problems results from the fact that the courts have decided that classification decisions of the Secretary of the Interior are conclusive as long as the Secretary has not acted fraudulently, arbitrarily or capriciously. With such broad power the Secretary is often able to decide whether the agricultural land laws will continue to be applicable in large areas of the public domain. For instance, he has classified huge sections of southern California as unsuitable for agriculture as a result of the Colorado River water rights decision.^{4/}

^{3/} 43 U.S.C. secs. 1411-1418 (1964).

^{4/} Arizona v. California 373 U.S. 546 (1963).

Classification decisions have frequently been contested in administrative proceedings and occasionally in court. Litigants have contended that the Secretary has literally abolished scrip, Indian allotment and other rights through the use of his classification power. Charges have been made that the Secretary has used classification as a means for determining water rights and that in classifying lands he has taken into account factors, such as economic feasibility, which Congress never intended him to consider. The right of the Secretary to classify land for disposal by sale rather than pursuant to one of the agricultural land laws has also been criticized.

This entire question of how much classification authority should be delegated to the Secretary should be examined. If it is determined that he does have too much authority or has failed to carry out the intent of Congress, the problem of how best to curb his authority must be considered.

B. Acreage Limitations Problems

All of the agricultural land laws contain limitations on the amount of acreage a person can obtain from the Federal Government. Chapter 5 presents a comparison of these various acreage limitations. As shown there, the maximum number of acres obtainable varies from one law to another.

All of the acreage limitations were established many years ago at a time when agricultural methods were substantially different than they are today. The study being conducted by South Dakota State University concurrently with this one discusses the acreage requirements in various parts of the country for an economic farm unit. That study will show that in most areas it takes more acreage than permitted under the statutory limitations. In such areas the agricultural land laws and policies create the following paradox.

The Secretary of the Interior considers economic feasibility in classifying lands for agricultural use. In those areas where an economic farm unit cannot be established without more acreage than permitted under the statutory maximums, the Secretary will presumably refuse to classify the land as suitable for agriculture because farming is economically infeasible. This means that unless there is

some change in the laws regarding acreage limitations, lands chiefly valuable for agriculture in such areas will never be put to their highest and best use.

This problem of acreage limitations is one of the most serious warranting consideration. The first question is whether the limitations should be increased. If so, to what extent? The economic data being prepared by South Dakota State University provides some answers to these questions.

C. Problems Arising From the Qualification Requirements for Making Entry

The present qualification requirements for making entry give rise to several problems. Currently one of the most controversial problem areas involves group entries for desert land. This matter was discussed in Chapter 3, particularly with regard to the Indian Hill decision.

In many areas containing public land suitable for agriculture it is necessary to install extensive and expensive irrigation works in order to put the land into production. Very often it is not feasible to install works to serve just one entry. The only feasible way is to install facilities that can be used jointly by a group of entrymen. The financing of such joint use facilities is often made difficult, if not impossible, by the present policies relating to group entries. Today corporations, associations and partnerships are not eligible to make entries or accept assignments of entries. Only individuals can do so. Consideration should be given to the need to modify these laws to make it easier for groups of entrymen to work together toward a common goal of reclaiming large areas through cooperative endeavors.

Another problem area regarding eligibility of entrymen involves the restriction on ownership of land. The homestead laws prohibit entry by anyone owning more than 160 acres, regardless of whether this land was acquired from the Government or from private sources. The desert land and Indian allotment laws do not have similar restrictions. A person may own a million acres of land, if it was acquired from private sources, and still be eligible for a desert land entry or an Indian allotment. Also, while a person is precluded from making a homestead entry if he owns more than

160 acres, he is not prevented from making an entry because of any other form of wealth. In other words, a millionaire whose assets are not in land is eligible for a homestead while a person owning 161 acres of worthless land on the top of a rocky mountain is not eligible.

These inconsistencies and inequities could become major problems if homesteading and desert land entries again become popular. If one of the objectives of the agricultural land laws is to prevent concentration of wealth, consideration should be given to relating eligibility to total net worth and not just to ownership of land.

D. Problems Involving Final Proof Requirements

There are several areas where the requirements for making final proof under the agricultural land laws cause problems. The cultivation requirements of the homestead laws are an example.

The homestead laws require cultivation of one-sixteenth of the land during the second year after entry and one-eighth during the third year. These requirements were put into the law over 100 years ago at a time when it was presumed that the homesteader would be a sod buster possessing little more than the most rudimentary tools and having to rely exclusively on human and animal power to clear and cultivate the land. Under such circumstances it might very well take a homesteader two or three years to get a small fraction of his entry into cultivation. In those days an entryman may have been able to subsist on what could be produced on one-sixteenth or one-eighth of his entry.

But today things are different. With the use of machinery, any 160 or 320 acre tract that is suitable for agriculture can put into cultivation in a relatively short time, generally within a year. Also, under present living standards, if an entryman is going to use his entry as his principal means of support, and this is one of the criteria often used in determining economic feasibility in classifying land as suitable for agriculture; most, if not all of his entry, must be placed into production within a year or two.

Consideration should be given to modernizing these cultivation requirements. Increasing them may have the salutary benefit of discouraging land speculators from trying

to get title to Federal land under the agricultural land laws. They would be discouraged because an earlier and larger investment to develop the land for farming would be required.

Another problem area is the desert land law requirement that the entryman make annual expenditures of \$1.00 per acre for three years. Problems have arisen in interpreting this requirement. Usually the problems have revolved around the question of whether the entryman must personally make such expenditures or whether it is sufficient if he causes the expenditure to be made by someone else. These problems can become intertwined with the problem of group entries as happened in the Indian Hill case discussed in Chapter 3. 5/ Consideration should be given to the possibility of making the present statutes and regulations regarding annual expenditures more precise so that entrymen will be better informed on exactly what is required.

Another area of problems in meeting the requirements for a patent involves the leasing, assigning and mortgaging of desert land entries. At the present time desert land entries may be mortgaged in states recognizing the lien theory of mortgages but not in states recognizing the title theory. This inconsistency comes about because of the statutory restrictions against assignments of entries. A mortgage which creates only a lien is not considered an assignment, but a mortgage which is presumed to establish title in the mortgagee is. Consideration should be given to making the ability to mortgage desert land entries uniform in all states.

An entry can be assigned only to someone who meets all the requirements of an entryman. An attempted assignment to anyone else will usually result in a cancellation of the entry. However, a proper lease can be made with anyone regardless of whether or not he meets the requirements of an entryman. Therefore, whether an instrument is construed as a proper lease or an unpermitted assignment is very important to an entryman. If it turns out to be the latter, he may lose his entry. The problem of what terms can be inserted in a lease without jeopardizing the entry is a vexing one for entrymen and consideration should be given to the need for clearer guidelines in this area. The entryman should be able to

5/ Supra, pp. 154-65

learn in advance with certainty what the consequences of his acts will be before he executes any instrument purporting to be a lease.

A further problem involving final proof relates primarily to reclamation homesteads. It is the problem caused by the entryman failing to make final reclamation proof within a reasonable time. There are a substantial number of cases in which the entryman has made his final homestead proof but has gone for years without making final reclamation proof. This presents several problems. It results in the necessity of keeping the particular case file open longer than otherwise required, thereby increasing the paper work for the Government. It also can result in the entry not getting on the local tax rolls as soon as it otherwise would. Some entrymen may be refraining from making final reclamation proof in order to avoid taxes. Consideration should be given to requiring all types of final proof to be made within a reasonably short period of time.

E. Problems Relating to Selecting The Method To Be Used For Disposing of Land

Under the existing laws, homesteads and Indian allotments are disposed of without charging for the land. There are small fees that must be paid, but nothing is paid for the land. The desert land law is different in that the entryman is required to pay \$1.25 per acre, in addition to certain fees.

In 1961 the Secretary of the Interior stated that henceforth the Federal Government should receive a full return for its property in terms of cash or other values. There was no apparent statutory authority for such a broad policy. By virtue of the fact that patents for homesteads and Indian allotments have been granted since that announcement, the Secretary obviously has not attempted to apply this policy to homesteaders or allottees. However, the Secretary's policy statement does serve to raise the question whether the granting of free land or land at a nominal price should be continued. At the present time there does not appear to be any pressing need to increase agricultural production in the United States. Therefore, it is reasonable to question whether there is any necessity for the Government to subsidize agricultural development by granting land at less than full value. Consideration

should be given to whether the policy announced by the Secretary in 1961 should be implemented by statute and applied to all forms of disposal of agricultural land.

Another problem concerning disposal has arisen under the present laws. It is whether the Secretary of the Interior should have the authority to determine the method of disposal to be used when land is classified for disposal. The Public Land Sales Act of 1964 6/ says that the Secretary of the Interior is authorized and directed to dispose of public lands that have been classified as chiefly valuable for agriculture and that such land shall be disposed of at not less than the appraised fair market value. At the same time the Classification and Multiple Use Act of 1964 7/ grants the Secretary the authority to classify lands as chiefly valuable for agriculture and says that it shall not be construed as a repeal of any existing law. It is not easy to discern what the intent of Congress was when it passed these two laws at the same time. The Classification Act indicates Congress intended that the homestead, desert land and allotment laws would continue in existence with their provisions for free or low cost land. On the other hand, the Public Land Sales Act directs the Secretary to obtain at least the appraised fair market value when disposing of any agricultural land. One way to reconcile the acts is to assume Congress intended to give the Secretary the authority to dispose of agricultural land either by opening it to entry for homesteads, desert land entries, or Indian allotments or by selling it. This appears to be the interpretation the Secretary has given to the intent of the two laws when considered together. As both of these 1964 Acts are interim measures, consideration will have to be given to the desirability of making them permanent. At that time it would be well to consider whether the Secretary should have complete authority to determine whether agricultural land should be disposed of by sale or pursuant to one of the agricultural land

laws and whether the intent of the two laws should be clarified.

When the Secretary's present authority to select between various methods of disposal is coupled with his authority to classify or refuse to classify lands, it becomes clear that the Secretary can determine whether the agricultural land laws have any effect or not. He can in effect breathe life into them or abolish them, as long as he acts in good faith. This means that change in philosophy by the Secretary or a change in secretaries could have the same effect as a repeal or subsequent reenactment of the agricultural land laws. Consideration should be given to the desirability of continuing such broad authority in the Secretary.

6/ 43 U.S.C. secs. 1421-1427 (1964).

7/ 43 U.S.C. secs. 1411-1418 (1964).

ALTERNATIVES TO THE EXISTING SYSTEM

In this closing chapter a number of alternatives to the existing system of laws and policies relating to intensive agriculture are analyzed. These alternatives have been selected from a list which is included in the appendices. ^{1/} This list was developed after examining the existing laws and policies, legislation proposed in years past and suggestions made by interested groups. These alternatives offer possible solutions to some of the problems discussed in the preceding chapter.

Each alternative is succinctly described. Details for implementing the alternative, such as drafts of legislation or suggested changes in the language of regulations, are not given in most instances. The intent is to present broad general alternatives with a summary of the probable advantages and disadvantages of each. While each alternative is stated in a positive manner, this does not mean that its adoption is being advocated by this report. No conclusions or recommendations are given. The task of drawing conclusions, making recommendations and prescribing action is left to the Public Land Law Review Commission.

A. The Homestead, Desert Land and
Indian Allotment Laws Should Be
Repealed

1. The Laws Should be Completely Repealed

One obvious alternative to the present system of agricultural land laws is to repeal them. This would mean repealing the homestead, desert land and Indian allotment laws. While this may be a rather drastic step, it should be remembered that the country expanded and disposed of great quantities of land before these laws were passed. So they are not necessarily indispensable. Also, as indicated by the statistics cited in earlier chapters these laws are not being used much anymore and there does not seem to be any prospect that they will be used to a great extent in the future.

^{1/} See Appendix F, p. F-1.

The acreage limitations provided for in them generally do not permit the establishment of economic farm units. The best of the public lands suitable for agriculture were, for the most part, transferred out of Federal ownership many years ago and there are relatively few tracts of agricultural land left in public ownership.

Any repeal of these laws should be made subject to existing valid rights and obligations. In other words, persons who have already made entry but have not yet obtained a patent should be entitled to perfect their entries to patent under the existing laws. But no new entries would be allowed.

There are several advantages that would probably accrue from these laws. Repeal would eliminate the necessity of the Bureau of Land Management having to accept and process applications for agricultural entries, almost all of which are certain to be denied. This would eliminate a certain amount of work which should result in some savings. Repeal would also put an end to speculators trying to use these laws to obtain free or low cost land in hopes of later selling it for a profit.

Today it is virtually impossible for anyone without financial resources to take advantage of these laws. It is often necessary to spend considerable sums to demonstrate the economic feasibility of farming a proposed entry and if an application is approved more money must be spent in putting the land into cultivation. Thus, these laws do not assist the poor and cannot be considered as weapons in the war against poverty. Because the land is disposed of at much less than full value, speculators are tempted to try to perfect entries.

If the desert land laws are repealed there may be the further advantage of preventing additional land from being put into production in areas that are already overdrawing on their existing water supply.

The probable disadvantages from repealing the agricultural land laws are that this would end the possibility of individuals obtaining low cost or free land for establishing new family farms. This possibility, while remote, still exists and occasionally patents are issued for homestead, desert land entries and Indian allotments. The repeal of

these laws might stifle the initiative of those hardy souls who are willing to risk their own resources to develop areas that are now unproductive and of no real value to anyone.

2. The Laws Should be Repealed Except in Selected States

A variation of the alternative of complete repeal of these laws, is to repeal them in all but certain selected states. For instance, they could be repealed in all states except Alaska. As approximately half the remaining public domain is in Alaska and that state is sparsely populated, the argument for the retention of these laws in that area may be more valid than it is for the remainder of the country. By making the laws ineffective everywhere but Alaska, most of the advantages to be obtained by outright repeal would still be received. At the same time the benefits of these laws would still be available in Alaska where most of the homesteading is going on and where there is perhaps the most potential for further need of the native allotment laws.

A further variation along these lines might be considered with regard to the desert land laws. They are presently being used very little outside of Idaho and Nevada. Consideration should be given to repealing these laws in all but those two states. This would have the advantage of eliminating the processing of applications in all other states, while at the same time retaining whatever advantages result from these laws in the two areas where they are still most actively used.

The idea of making land laws applicable to only certain states is not new. The enlarged homestead and the desert land laws have always been limited in their application to specific states. 2/ Under this alternative the number of states subject to the desert land laws would simply be decreased.

B. The Acreage Limitations of the Various Agricultural Land Laws Should Be Increased To Permit the Establishment of Economic Farm Units

1. The Limitations Should be Uniformly Increased in All Areas

2/ 43 U.S.C. secs. 218, 323 (1964).

There are several ways in which the acreage limitations in the present laws can be increased to permit establishment of economic farm units. One alternative is simply to adjust the present limitations upward to new figures. The only problem is first determining what acreage is needed for an economic farm.

The advantage of increasing the acreage limitations is that it would enable people to obtain at least enough land to provide themselves a reasonable standard of living. This presumably has always been one of the goals of the agricultural land laws. Also, an increase in the acreage limitations should enable lands chiefly valuable for agriculture to be disposed of under the agricultural land laws and put into cultivation. Now it is not always possible to do this. If more acreage is needed than is permitted under the laws, the establishment of farms is economically infeasible. Under present practices the Secretary of the Interior has usually refused to classify land as suitable for agricultural use if farming is economically not feasible.

The disadvantage to increasing acreage limitations is that it would permit concentration of ownership of land. As the amount of Federal agricultural land is limited, any increase in the maximum obtainable by one person means fewer people will probably share this remaining land.

2. The Acreage Limitations Should Vary From Area to Area According to Local Conditions

Another way of increasing the acreage limitations, other than merely changing the numbers in the present laws, is to provide for limitations that vary from area to area. Such limitations would take into account differences in such factors as soils, climate, topography, irrigation water, access to markets, or other factors that affect the economics of farming. The present acreage limitation provisions apply uniformly throughout the United States and allow no recognition of such differences.

Providing varying acreage limitations can be accomplished in several ways. Congress can establish different limitations for different areas or it can delegate to someone, such as the Secretary of the Interior, authority to fix acreage limits for each area. What would have to be decided is how much authority Congress wants to delegate. It could delegate very broad powers or it could confine the authority to vary the limits within certain prescribed bounds. This latter procedure was followed in the reclamation laws. There the Secretary of the Interior has authority to establish the size of farm units within the limits of not less than ten nor more than 160 acres. 3/

3/ 43 U.S.C. sec. 434 (1964).

The advantage to providing for varying limitations is that it permits recognition of the obvious, namely, that the public domain is not a homogeneous whole but is scattered over a substantial area having many different characteristics. Varying limitations would permit the establishment of economic farm units throughout the public domain while at the same time preventing an entryman from obtaining more acreage than is required for a family size farm in his particular area.

The disadvantage of permitting varying limitations is that it would be much harder to administer than uniform limitations. The official responsible for establishing the various limits would probably be subject to continuous pressure both to raise and to lower the limitations and to make exceptions. If Congress in its legislation providing for varying acreage limitations puts too many restrictions on the executive branch's authority to establish such limitations, the result may be laws and regulations that are too inflexible to produce the desired benefits. At the same time, if Congress places no restrictions on the authority to establish limits or too few restrictions, the result may be too great a concentration of power.

C. Changes Should be Made in the Classification Laws

At the present time the Secretary of the Interior has almost plenary power in classifying public lands and determining which land, if any, will be made available for agricultural use. Alternatives to this situation have been suggested.

The alternatives discussed here generally assume that the existing agricultural land laws will be retained in much their present form. However, these alternatives are also worthy of consideration in the event it is decided to repeal the present laws. Regardless of whether the existing agricultural land laws are repealed or kept in existence, it will still be necessary for someone to classify land and determine if any of it should be disposed of for agricultural purposes.

1. The Classification Authority Delegated to the Secretary of the Interior by the Classification and Multiple Use Act of 1964 Should be Made Permanent

One alternative to the present classification laws is to make the interim authority delegated to the Secretary of the Interior by the Classification and Multiple Use Act of 1964 4/ permanent. This authority is scheduled to expire six months after the final report of the Public Land Law Review Commission has been submitted to Congress. The objective of this alternative would be to provide permanent and continuous classification and reclassification under the criteria established pursuant to the 1964 law.

4/ 43 U.S.C. sec. 1411-1418 (1964).

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The probable advantage of this alternative is that it would permit continuity in classification under already established criteria. If the authority given in the 1964 Act is allowed to expire there may be serious questions about the extent of the Secretary's authority thereafter. He would still have the authority given to him by section 7 of the Taylor Grazing Act 5/ but it has never been determined if that authority is as extensive as that given to him under the 1964 Act.

The disadvantage of this alternative is that it would continue in existence any undesirable features of the present law. It would mean a continuation of the Secretary's rather extensive discretionary authority to make classifications. To the extent that it is felt that he has too much authority, making the 1964 Act permanent would be considered undesirable.

2. The Secretary of the Interior Should Not Be Required to Accept Applications For Agricultural Entries Except in Areas He has Designated as Suitable for Such Entries

Under this alternative the filing of applications for entry under the agricultural land laws would be prohibited except in areas that the Secretary of the Interior has first designated as open to the filing of such applications. This would reverse the present procedure. Today when an interested party files an application-petition for entry the Secretary of the Interior is required to classify the land being sought. Under this alternative no application could be filed in any area unless and until the Secretary had classified the land as suitable for farming. In other words, under this alternative the Secretary would have to take the first step, whereas under the present law the applicant is permitted to initiate classification. The objective of this alternative would be to prevent the filing of applications for agricultural land in areas that have not been classified as suitable for such use.

This alternative could be effected by removing the present provisions in section 7 of the Taylor Grazing Act which require the Secretary to classify lands for which an application for entry is filed and substituting in their place provisions prohibiting the filing of applications except in areas designated by the Secretary.

There are several advantages to this alternative. It would produce some of the same benefits mentioned earlier in discussing repeal of the agricultural land laws in that it would prevent wasteful expenditure of time and money in pro-

5/ 43 U.S.C. sec. 315f (1964)

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cessing futile applications. It would assure that applications for agricultural entries would be filed only for lands that had been examined and classified as suitable for such use.

The real disadvantage to this alternative is that it would concentrate even more power in the Secretary of the Interior than he presently has. Under the present law an applicant can force the Secretary to make a classification as to the suitability of a particular tract for agriculture and any classification he makes must be in good faith and not arbitrary or capricious. Under this alternative there would be no way for an individual to compel the Secretary to classify any particular piece of land. If a Secretary were philosophically opposed to further entries under the agricultural land laws he could prevent them by refusing to designate any areas as suitable for such entries.

3. Applicants for Desert Land Entries Should Not Be Required To Show Economic Feasibility Before Being Allowed to Enter Public Land

One of the most frequently criticized criteria which the Department of the Interior presently follows in classifying lands as suitable for agricultural entry is that of requiring a showing of economic feasibility. This is particularly so with regard to applicants for desert land entries. Before his application will be approved, a prospective desert land entryman must show not only his ability to finance the required development but also that farming the land is economically feasible. Sometimes prospective entrymen have had to spend substantial sums of money for elaborate feasibility reports by economists and engineers in order to substantiate their applications.

This alternative would permit a prospective entryman who wanted to risk his time and capital to make an entry without having to first demonstrate its feasibility. The Department of the Interior would be prohibited from requiring any advance showing of economic feasibility as a criterion for the approval of an application to make an entry on agricultural land. If the Secretary of the Interior determined that the land could produce crops, it would be for the prospective entryman and not the Secretary to decide if farming was economically feasible.

The probable advantages of this alternative is that it would remove present bureaucratic determinations of economic feasibility. It would let the entryman be the judge of whether he wants to risk his time and capital. If his judgment is wrong and he fails to reclaim the land it will be his loss and he will not be given a patent.

The disadvantages of this alternative are that it might result in entrymen attempting to cultivate land that should

not be put into cultivation. Under this alternative, the Secretary might be required to classify some land as suitable for agriculture, where he would not do so if he were permitted to consider economic feasibility. In such a case land might be put into cultivation when there is no realistic hope of the entryman being able to establish a successful farming operation. Such a result could destroy grazing lands and cause erosion with no offsetting benefits to anyone. It can be argued that individuals should not be allowed to inflict such damage upon the public domain regardless of their willingness to risk their own resources.

4. In Classifying Lands the Secretary of the Interior Should be Prohibited From Making Any Determinations of Water Rights. Also, Desert Land Entries Based Upon Percolating Groundwater Should Be Permitted in all States

A great deal of emphasis is placed upon the availability of a water supply in classifying land. The Secretary of the Interior has been accused of attempting to determine water rights through his classification authority and some of his decisions involving water rights questions have been criticized. The suggestion is often made that all water rights matters should be left to the determination of the states. The classification regulations promulgated by the Secretary seem to agree with this suggestion. They say that nothing in them "is meant to affect applicable State laws governing the appropriation and use of water . . ." 6/ But there are claims that these regulations have not always been followed in classifying land.

The Secretary has also been criticized because he presently follows a policy of prohibiting desert land entries based upon percolating groundwater where state law does not make such groundwater subject to prior appropriation. The Solicitor of the Department of the Interior has determined that in order to qualify for a desert land entry the entryman must show that he has an appropriative right to water. 7/ In those states that do not recognize an appropriative right in percolating groundwater an entry cannot be based upon such water.

In one sense the Department and Secretary may be said to be getting it from both ends. In some instances they have been condemned for attempting to follow state law with regard to percolating groundwater, while in some other cases they have been criticized for supposedly ignoring state law.

As an alternative to the problem relating to percolating groundwater, the present laws and policies could be revised.

6/ 43 C.F.R. sec. 2410.0-2 (1968).

7/ Solicitor's Opinion M-36263 (February 23, 1955).

Desert land entries based upon percolating groundwater could be permitted in all states, including those where groundwater is not subject to prior appropriation. Under the present interpretation of the law identical factual situations in two different states produce exactly opposite results. In one situation a desert land entry will be permitted on the basis of percolating groundwater and in another it will not. This inconsistency can probably be changed by a simple amendment to 43 U.S.C. sec. 321 (1964) by adding after the word "appropriation" the words "or other basis of right recognized by state law".

The advantage of this alternative is that it would provide for uniform application of the desert land law in all states regardless of the legal basis on which the particular state recognizes rights to use percolating groundwater. The only apparent disadvantage is that this might tend to open land for desert land entries in water short states and thereby possibly invite further demands on already overtaxed water supplies.

As to the other alleged problem of the Secretary often attempting to determine state water rights through the classification procedure, the prohibition in the present law and regulations against making such determination could be strengthened. An alternative to the present law would be to provide that if under state law the land or the applicant has a water right, the Secretary would be bound to recognize it. Thereafter, in classifying land he would be precluded from denying an application on the grounds that the applicant has no right to the use of water or that such use would have an adverse effect on others.

The advantage of such an alternative is that it would implement the intent of Congress as expressed in the Classification and Multiple Use Act of 1964. Congress said that nothing in that act is to be construed as affecting the jurisdiction of the states. 8/ The implication of this is that in classifying lands, water right determinations are matters to be left solely to the states. Also, such an alternative would eliminate the present practice of dual interpretation of water rights by both the state and Federal Governments. The state and the Federal Government have not always agreed in their interpretations.

A disadvantage of this alternative is that one of the key factors in determining the suitability of land for agricultural use is the presence or absence of water and a person's right to use such water. If the Secretary is prohibited from considering an applicant's right to water, he will not be able to make an intelligent decision on whether to open the land for entry. It can be argued that it makes no more sense to prohibit the Secretary from fully considering the question of the

8/ 43 U.S.C. sec. 1417(d) (1964).

applicant's right to water than it would be to prohibit him to consider the applicant's ability to obtain seed, fertilizer or any other ingredient necessary to produce a crop.

D. The Federal Government Should Receive Full Value in Return For Its Property

Under the present agricultural land laws Federal land is disposed of either free of charge or at nominal costs. Desert land entrymen must pay \$1.25 per acre while homesteaders and Indian allottees pay no charge for the land. An alternative to this system is to provide for a greater return to the Federal Government for any land disposed of for agricultural use. How much the Federal Government should receive is a policy matter.

1. The Government Should Charge Full Market Value

One alternative would be to charge the full market value. The way this could be done would be to establish the fair market value by appraisal and then put the land up for sale by competitive bidding with the appraisal price being the minimum acceptable bid. There is relatively little public domain left that is suitable for agriculture. Therefore only a small percentage of the population can possibly obtain a share of it and it can be argued that the only fair way to make this small amount of land available to all is to sell it by competitive bidding.

The obvious advantage of this alternative is that it would give the Federal Government full value for its land. It would prevent a windfall to anyone and end subsidization. Making prospective users of public domain pay full price for the land should curtail speculation and discourage or prevent the cultivation of public land which ought not be cultivated. This in turn should encourage more intensive use of private land and tend to increase its value.

The disadvantage of an alternative requiring full cash value for Federal land is that it would make it impossible for persons without money to obtain such land. Also, it would have the effect of ending the present agricultural land laws because the land would have to be disposed of prior to entry and all of the present requirements concerning entry, cultivation, residence, etc., would be eliminated. Another possible disadvantage would be the administrative cost in appraising land and providing for sales. However, any such added administrative costs might be offset by the elimination of expenses required under the present laws and policies.

2. The Government Should Charge Full Market Value Less a Certain Sum Per Acre

A variation of the alternative of requiring full cash

value would be to provide for the disposal of agricultural lands at a price not as high as full value but close to it. As an example, the land could be disposed of at full value less \$25.00 per acre. The price could be established at the time of entry and an agreement entered into with the entryman that would require him to pay such a price before issuance of a patent. The objective of this alternative is to provide a greater return to the Government for its land than it presently gets but at the same time grant a subsidy to encourage the development of agricultural lands. Under this alternative the residence, cultivation and other requirements of the agricultural land laws could be continued.

The advantages of this variation are several. It would return almost full value to the Federal Government. It should discourage speculation. It would offer an inducement for developing the land for agricultural purposes and by still requiring cultivation and other requirements and making the entryman wait several years for his patent it would give some assurance the land would be used for farming.

The disadvantage of this alternative is that it would grant public property to a citizen at less than full value, but that is being done under the present agricultural laws. It would also have the disadvantage, although to a lesser extent than under the alternative of charging full value, of preventing many people from being able to obtain agricultural land.

3. The Government Should Charge Full Market Value and Restrict the Use of the Land to Agriculture

There is still another possible alternative to the present laws providing cheap land. It is to provide for the sale of agricultural land at full market value but to put a restriction in the patent limiting the use of the land to agricultural purposes either permanently or for a specified number of years. The objective of this alternative would be to obtain full value for the property while at the same time assuring that it will be used for agriculture. If it is determined that the land is chiefly valuable for agriculture and the Federal Government wants to be assured that the natural resources are used for their highest and best use this alternative might be considered.

This variation has the same advantages as the alternative providing for sale at full cash value, except that the price would undoubtedly be somewhat less because of the patent restrictions. It would have the further advantage that land chiefly valuable for agriculture would not be diverted into other uses, at least for a specified period of time. This would discourage speculators from buying the land.

However, this alternative would have certain distinct disadvantages. First, as indicated above, the price which the Government would receive would be somewhat less than could be obtained if there were no restrictions on use. Second, if there are restrictions on use, there would be the administrative problem of seeing that there was compliance with the restrictions. If there was no compliance there would be the further administrative problem of enforcement. There could be an additional disadvantage if restrictions of use are put in the patent. It is possible that the highest and best use of the land might change from agriculture to something else during the period of restricted use. In such a case the restriction would not be in the public interest.

E. Corporations, Partnerships and Associations Should Be Permitted to Make Homestead and Desert Land Entries

Under the present laws only individuals are eligible to make entries. Corporations and partnerships cannot qualify as entrymen. While in certain instances group entries are permitted, they really can be done only if all of the members of the group are able to demonstrate their continued individual status. There is great danger whenever a group of entrymen undertake activities jointly that their entries will be rejected because of such group activity. This is so even though it is often desirable that groups of entrymen unite to solve common problems. Therefore, as an alternative to the present legal system, eligibility for entrymen could be changed to include corporations, partnerships, and associations.

Such an alternative would permit recognition of the fact that corporate farming is becoming more prevalent. It would enable entrymen to operate as corporations or partnerships if there are business or tax advantages in doing so. It should be noted that the Federal Government does permit corporations to use Federal lands for agricultural purposes in some instances. For instance, Department of Agriculture use permits for farming can be granted to corporations, and the Bureau of Reclamation leases agricultural land to corporations. Also, the Public Land Sales Act of 1964, 9/ which directs the Secretary of the Interior to dispose of land classified as chiefly valuable for agriculture, says that such land may be sold in tracts up to 5,120 acres to qualified individuals. "Qualified individuals" is defined in the act to include not only individuals, but partnerships, associations and corporations. 10/ Thus, there is precedent for disposing of agricultural land to other than individuals.

9/ 43 U.S.C. secs. 1421-1427 (1964).

10/ 43 U.S.C. sec. 1425 (1964).

The advantage to this alternative is that it would permit persons who presently farm or contemplate farming under corporate status from having to abandon such a practice or resort to subterfuge in order to take advantage of agricultural land laws. It would also permit groups of entrymen more flexibility in contracting with each other for joint facilities and in obtaining financing for such works.

The disadvantage of this alternative is that it might permit an individual or a small group of individuals to obtain large blocks of public domain in concentrated ownership through the use of numerous corporate entities all owned by the same person or persons. It would clearly abandon the concept of encouraging the establishment of family farms. It would obviously require the elimination, at least to some extent, of the residence requirements in the homestead laws because of the inability of corporations to meet them.

F. The Cultivation Requirements in the Homestead Law Should be Changed

One of the principal requirements in making final proof on a homestead entry is cultivation. The law requires the entryman to cultivate one-sixteenth of his entry during the second year and one-eighth during the third year after entry. These requirements, as indicated in the previous chapter, are really not in tune with the times. As an alternative, the entrymen should be required to achieve maximum cultivation of his entry within a year or two. What would be considered maximum cultivation would be determined by the agricultural practices in the area.

The advantage of this alternative is that it would require the homestead entryman to proceed more quickly in developing his land. It would discourage speculators who have no intention of permanently farming the land because it would require them to invest far more in agricultural development than they now have to do. At the present time a speculator disguised as a farmer can obtain a patent by cultivating only one-eighth of his land. Another advantage to this alternative is that if it is desirable to open public land for agriculture this would get the land into production more quickly.

The disadvantage of this change is that it would force entrymen to have more capital available at the time of their entries than is required by the present laws.

G. Mortgaging of Desert Land Entries Should be Permitted in All States

The present law permits the mortgaging of desert land entries but prohibits assignment of the entry to anyone not qualified to be an entryman. Consequently, under the inter-

pretation of the present law mortgages are permitted in those states that recognize the lien theory of mortgages but not in states recognizing the title theory. The Department of the Interior's position is that in title theory states a mortgage is a conveyance and tantamount to an assignment unless made to a qualified entryman. Because of the differences in state laws regarding the theory of mortgages, different results occur under the desert land laws from one state to another even though the factual situation and the reality of the mortgagee's interest are the same in both cases. This alternative would abolish the distinction between mortgaging under the two theories and permit mortgaging of desert land entries in all states regardless of that state's theory of mortgages.

This would have the advantage of providing uniformity in administration of desert land entries in all states based upon the practical effect of the transaction without regard to legal theory.

There does not appear to be any real disadvantage to this alternative. In the event that the mortgagee is required to foreclose on his mortgage his position would be the same in both states. He could qualify as an assignee only if he could meet the requirements of an entryman. If he could not, he would not be entitled to any patent. Any intelligent mortgagee would take this into account in determining whether to loan money to the mortgagor.

H. The Laws and Regulations Governing Leasing of Desert Land Entries and Having Third Persons Perform the Final Proof Requirements Should Be Clarified

The present laws and policies do not clearly define the distinction between a permissible lease of a desert land entry and an unpermitted assignment. The same is true with regard to distinguishing between hiring someone to perform necessary reclamation work and assigning the entry. Under the present policies of the Department of the Interior, particularly those established subsequent to the Indian Hill decision, 11/ the ability of an entryman to lease his entry and have someone else carry out the final proof requirements is quite restrictive. At least, an entryman contemplating such action must be on guard to be sure that his lease is not construed as an invalid assignment. Also, at the present time the regulations do not clearly state which expenditures made by a third person will be considered as fulfilling part of the entryman's expenditure requirements. These vague areas in the law can trap an entryman acting in good faith and cause him to lose his entry. An alternative to this present system would be to clarify this area of the regulations so

11/ Supra pp. 154-65

that an entryman will know with certainty what types of agreements he can enter into without fear of loss of his entry. The terms which can or cannot be included in a permissible lease could be set forth with specificity.

This alternative would have the obvious advantage of making more clear what is felt by some to be an ambiguous policy. It would protect entrymen from inadvertently entering into unpermitted assignments and thereby voiding their entries.

The only disadvantage of this alternative is that it would require the Department of the Interior to spell out its policies more clearly. This would provide for more rigidity and perhaps diminish the Department's administrative flexibility.

APPENDIX A
PUBLIC LAND LAW ACTIVITY
STATISTICS

INDEX

<u>Table No.</u>	<u>Subject</u>	<u>Page</u>
1	Homestead and Preemption Entries	A-2
2	Final Homestead Entries Approved	A-5

P. Gates & R. Swenson,
History of Public Land Law Development
 pp. 799-801 (1968)

HOMESTEAD AND PREEMPTION ENTRIES ^a								
Year	Original		Final		Commutations ^b		Preemptions	
	Number	Acres	Number	Acres	Number	Acres	Number	Acres
1863	8,223	1,032,871						
1864	9,505	1,247,170						
1865	8,924	1,141,443						
1866	15,355	1,890,817						
1867	16,957	1,834,512						
1868	23,746	2,332,151	2,772	355,086				
1869	25,628	2,698,481	3,965	504,301				
1870	33,972	3,754,203	4,011	519,728				
1871	39,768	4,657,355	5,087	629,162				
1872	38,742	4,595,435	5,917	707,409				
1873	31,561	3,760,199	10,311	1,224,891				
1874	29,126	3,489,570	14,129	1,585,782				
1875	20,668	2,369,782	18,293	2,068,538				
1876	25,104	2,867,813	22,530	2,590,553				
1877	18,675	2,176,257	19,900	2,407,828				
1878	35,630	4,496,854	22,460	2,662,981				
1879	41,005	5,267,384	17,391	2,070,842				
1880	47,293	6,054,708	15,441	1,938,235				
1881	36,999	5,028,100	15,077	1,928,005	858	177,329	5,050	721,146
1882	45,331	6,348,045	17,174	2,219,454	7,438	1,077,383	9,255	1,351,380
1883	56,565	8,171,914	18,988	2,504,414	8,411	1,286,119	15,221	2,285,710
1884	55,045	7,831,509	21,843	2,945,575	9,623	1,426,188	21,286	3,206,095
1885	50,877	7,415,885	22,066	3,032,679	7,633	1,127,444	15,800	2,311,296
1886	61,638	9,145,135	19,356	2,663,532	4,866	720,415	15,712	2,279,218
1887	52,028	7,594,350	19,866	2,749,037	10,201	1,578,707	21,403	3,172,411
1888	46,236	6,676,615	22,413	3,175,401	14,057	2,137,988	23,151	3,463,306
1889	42,183	6,029,230	25,549	3,681,709	10,030	1,521,537	19,586	2,902,028
1890	40,244	5,531,678	28,080	4,060,593	6,065	905,536	15,243	2,204,905
1891	37,602	5,040,393	27,666	3,954,588	3,916	546,302	9,803	1,391,413
1892	55,113	7,716,062	22,822	3,259,897	2,914	383,699	6,603	913,782
1893	48,436	6,808,791	24,204	3,477,232	3,175	425,665	4,824	718,336
1894	56,632	8,046,967	20,544	2,929,617	2,379	319,308	1,332	195,578
1895	37,336	5,009,491	20,922	2,980,809	2,306	312,538	416	57,880
1896	36,548	4,830,915	20,099	2,790,243	1,875	242,305	345	47,170
1897	33,250	4,452,289	20,115	2,778,404	1,301	162,355	138	18,517
1898	44,980	6,206,557	22,281	3,095,018	2,331	313,205	112	15,399
1899	45,776	6,177,587	22,812	3,134,149	3,083	424,293	114	15,294
1900	61,270	8,478,409	25,278	3,477,687	3,953	543,944	120	16,350

TABLE 1
(Cont.)

HOMESTEAD AND PREEMPTION ENTRIES* (Cont.)								
Year	Original		Final		Commutations ^b		Preemptions	
	Number	Acres	Number	Acres	Number	Acres	Number	Acres
1901	68,648	9,497,275	37,544	5,240,780	5,115	709,855	81	12,065
1902	98,829	14,033,245	31,618	4,342,486	7,989	1,105,850	66	9,270
1903	80,188	11,193,120	26,343	3,575,761	15,198	2,194,743	104	14,200
1904	69,175	10,171,265	23,912	3,232,293	15,092	2,142,185	72	9,675
1905	70,344	12,895,571	34,765	4,835,488	10,144	1,416,100	46	5,619
1906	89,600	13,974,931	35,309	4,984,543	9,765	1,367,793	19	2,005
1907	93,957	14,754,584	40,545	5,769,783	13,343	1,926,526	20	2,701
1908	87,057	13,586,348	52,695	7,366,988	23,059	3,124,277	89	10,877
1909	75,445	12,302,146	46,767	6,763,682	21,257	3,064,215	74	8,315
1910	98,598	18,329,115	42,504	6,703,081	17,092	2,559,123	429	34,727
1911	70,720	15,189,087	44,456	7,385,019	17,679	2,635,969	24	1,706
1912	52,991	11,246,298	41,064	6,767,940	16,738	2,461,871	31	2,543
1913	57,800	11,222,053	59,363	10,884,822	6,111	875,536	22	3,063
1914	21,229	12,117,087	53,308	9,941,317	4,584	650,196	63	8,363
1915	62,360	12,439,774	40,037	7,560,805	2,694	379,923	7	740
1916	65,262	13,628,107	39,703	7,508,691	1,745	230,409	4	394
1917	58,896	12,020,527	45,222	6,683,248	1,494	185,818	6	221
1918	35,875	7,419,628	42,512	8,380,852	1,193	144,414	1	40
1919	39,341	10,203,965	33,464	6,615,818	841	91,057	2	86
1920	48,532	13,501,100	40,581	8,459,241				
1921	43,813	13,661,635	34,490	7,795,158				
1922	29,263	8,979,792	31,363	7,357,102				
1923	18,942	5,524,159	22,683	5,621,311				
1924	14,506	3,984,155	18,266	4,811,311				
1925	11,658	3,188,686	14,884	4,067,769				
1926	10,790	3,001,403	12,404	3,466,363				
1927	10,500	3,236,764	9,560	2,608,071	245	24,444		
1928	10,429	3,366,185	6,811	1,828,258	144	12,708		
1929	11,598	4,178,495	6,367	1,711,993				
1930	13,248	4,920,812	5,068	1,380,542				
1931	13,099	4,924,016	4,932	1,360,221				
1932	11,010	4,019,854	4,130	1,214,519	53	4,625		
1933	7,769	2,714,029	3,087	908,329				
1934	7,741	2,862,142	3,627	1,125,394				
1935	3,458	1,191,312	4,925	1,642,134				
1936	1,313	815,656	5,221	1,766,700				
1937	609	121,777	5,441	1,916,823				
1938	464	81,920	3,952					

TABLE 1
(Cont.)

HOMESTEAD AND PREEMPTION ENTRIES* (Cont.)

Year	Original		Final		Commutations ^b		Preemptions	
	Number	Acres	Number	Acres	Number	Acres	Number	Acres
1939	410	70,925	3,081	1,089,936				
1940	383	50,141	1,815	654,015				
1941	425	53,440	1,187	389,970	30	2,230		
1942	285	37,435	821	202,666	18	1,324		
1943	213	29,299	499	114,481	18	1,440		
1944	158	19,868	418	53,719	17	1,319		
1945	185	22,694	249	37,398	11	1,064		
1946	144	18,260	254	33,506	4	240		
1947	475	55,092	243	30,200	26	2,121		
1948	689	85,734	168	20,576	6	481		
1949	684	82,712	335	41,541	16	2,112		
1950	571	79,840	418	49,392	14	1,567		
1951	415	56,209	660	70,830	26	2,873		
1952	460	59,070	357	41,965	20	2,092		
1953	483	61,536	353	44,497	13	1,172		
1954	474	60,127	370	46,056	8	642		
1955	482	43,569	340	39,458	15	1,783		
1956	455	57,315	330	42,903				
1957	662	79,452	422	65,753	18	2,170		
1958	524	69,641	306	43,147	40	4,289		
1959	1,181	146,766	342	41,506				
1960	1,077	147,916	376	45,097				
1961	612	76,875	438	57,461				
1962	661	80,452	173	23,138	213	27,101		
1963	383	46,139	199	24,659	245	31,680		
1964	291	31,441	515	63,423	344	42,081		
1965	182	22,173	262	30,289	159	18,299		
1966	115	15,514	249	33,526	142	20,769		
1967	51	7,442	196	23,405	12	1,518		
Totals	2,992,058	510,748,328	1,623,691	270,415,324			186,674	27,413,863

* Preemption entries and commuted homesteads are not available in the *Annual Reports* for the years before 1831, nor have I been able to fill in the commuted entries for the years after 1919 save for scattered years and for 1941-1967. Most of the later commuted entries are for homesteads on Indian lands.

^b An official of the Department of the Interior told the author that commuted homesteads are included in the final entries in the columns above, though in some of the earlier years this is not clear. Homesteads on ceded Indian lands are not included. In *Public Land Statistics, 1967*, p. 6, the total acreage "granted or sold to homesteaders" i.e. final entries including commutations and homesteads on ceded Indian lands is 297,000,000. Jerry A. O'Callaghan, Bureau of Land Management, Department of the Interior, to the author, January 8, 1965.

TABLE 2

Source: Bureau of Land Management, Dept. of Interior, Public Land Statistics: 1967, Table 21 at 52.

FINAL HOMESTEAD ENTRIES APPROVED,
May 20, 1862 - June 30, 1967

Year	Number	Acres
1868-70-----	10,778	1,379,116
1871-75-----	53,737	6,215,783
1876-80-----	97,722	11,670,439
1881-85-----	95,158	12,630,327
1886-90-----	115,264	16,330,272
1891-95-----	116,178	16,602,473
1896-1900-----	110,593	15,275,647
1901-05-----	144,121	19,812,927
1906-10-----	130,430	19,005,358
1911-15-----	189,553	35,407,653
1916-20-----	195,401	38,909,565
1921-25-----	119,949	29,468,379
1926-30-----	39,439	10,922,304
1931-35-----	20,501	6,233,399
1936-40-----	19,533	6,783,129
1941-45-----	2,830	764,204
1946-50-----	1,215	156,904
1951-55-----	1,845	220,458
1956-60-----	1,628	221,680
1961-----	284	38,944
1962-----	173	23,138
1963-----	199	24,659
1964-----	147	19,445
1965-----	98	11,635
1966-----	85	10,741
1967-----	167	21,086
Total-----	1,467,028	248,159,665

Note. -- This table does not include commuted homesteads or homesteads on ceded Indian lands. The first homestead law was enacted May 20, 1862 (Rev. Stat. sec. 2289, 43 U.S.C. 2911).

APPENDIX B
FEDERAL LAND DISPOSAL FORMS

INDEX

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UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

PETITION FOR CLASSIFICATION
A PETITION TO CLASSIFY AND OPEN PUBLIC LANDS
TO ENTRY OR OTHERWISE TO MAKE THEM
AVAILABLE FOR DISPOSITION

NOTICE TO PETITIONER

Your application (which must be attached hereto) requests the Secretary of the Interior to take an action that is entirely within his discretion. The basis for the Secretary's authority and the policies and procedures

which he has established under that authority, are described in the regulation 43 CFR, Parts 2410 and 2411. A copy of these regulations can be secured from any land office of the Bureau of Land Management.

PETITION

I HEREBY PETITION The Secretary of the Interior to have the lands described in the attached application classified or otherwise made available for entry or disposition pursuant to my application.

I understand that if the Authorized Officer of the Bureau of Land Management does not make the lands available for disposition pursuant to my application, the regulations of 43 CFR, Part 2411, are applicable to my case.

(Date)

(Signature of Petitioner—Applicant)

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

FORM APPROVED
BUDGET BUREAU NO. 42-R973.3

Land Office and Serial Number

HOMESTEAD ENTRY APPLICATION

(43 USC 161, et seq.)

ITEM 1 - TYPE OR PRINT PLAINLY IN IN

1. Name of applicant (first, middle initial, and last)

Address (include zip code)

Hereby makes application for ☐ homestead entry ☐ enlarged homestead entry ☐ additional homestead entry

2a. Give legal description of lands applied for

SECTION	TOWNSHIP	RANGE	MERIDIAN	SUBDIVISION

State of

Containing a total of acres

b. If an additional homestead entry, give description of original entry

SECTION	TOWNSHIP	RANGE	MERIDIAN	SUBDIVISION

State of

Containing a total of acres

3a. Have you ever made entry upon any public land other than that described in Item 2b, above? ☐ Yes ☐ No
(If "yes," describe same by section, township, range, land district, number of entry, and state whether perfected)

b. Do you own more than 160 acres of land? ☐ Yes ☐ No (If "yes," give total acreage and location)

4a. Are you 21 years of age or over? ☐ Yes ☐ No

b. Are you the head of a family? ☐ Yes ☐ No

c. What is your marital status?

☐ Single ☐ Married ☐ Widowed ☐ Divorced

Give date of marriage

If husband is deceased, give date of death

5a. Are you a United States citizen? ☐ Yes ☐ No

b. If "no," have you filed a declaration of intention? ☐ Yes ☐ No (If "yes," complete the following)

Give Date	Name of Court	City
-----------	---------------	------

6. Have you served in the United States Military Service? ☐ Yes ☐ No (If "yes," complete the following)

Branch of Service	Dates of Service	Serial Number	Type of Discharge

7. Does the land applied for contain salt springs or deposits of salt in any form sufficient to render it valuable?
☐ Yes ☐ No (If "yes," explain)

8. Is any of the said land claimed or valuable for mining purposes?

9. Is any of the said land worked for minerals during any part of the year?

10. Are you making application for the purpose of obtaining title to mineral lands?

11. Is the said land occupied or improved by any Indian or other person?

12a. Does the land applied for contain any merchantable timber?

b. If additional homestead entry, does the land in your original entry contain merchantable timber?

13. Can the said land be successfully irrigated at a reasonable cost from any known source of water supply?

14. Is the required filing fee of \$25 attached?

15. Have you attached the required Petition for Classification (Form 2400-7)?

I CERTIFY That (a) This application is made in good faith for the purpose of actual settlement and cultivation, and not as agent for or in collusion with or for the benefit of any other person, corporation, or syndicate. (b) I am well acquainted with the character of the land herein applied for and with each and every legal subdivision thereof, having personally examined same. (c) The statements made by me in this application are true, complete, and correct to the best of my knowledge and belief and are made in good faith.

(Date)

(Signature of Applicant)

Title 18 U.S.C. Section 1001, makes it a crime for any person knowingly and willfully to make to any department or agency of the United States any false, fictitious, or fraudulent statements or representations as to any matter within its jurisdiction.

APPLICATION ALLOWED
(FOR OFFICIAL USE ONLY)

I HEREBY CERTIFY That the foregoing application filed at the Land Office in _____ is for surveyed land of the class which the applicant is legally entitled to enter under the Acts of February 19, 1909 or June 17, 1910; that there is no prior valid adverse right to the lands applied for, and has this day been allowed.

(Date Application Allowed)

(Signature of Authorized Officer)

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

FORM APPROVED
BUDGET BUREAU NO. 42-R971.2

Land Office

HOMESTEAD ENTRY FINAL PROOF

TESTIMONY OF CLAIMANT

SERIAL NUMBERS

Original entry

Additional entry

NOTE

The officer before whom this proof is made will see that all answers are complete and responsive to the questions, and that the answers bring out the pertinent facts showing the

entryman's compliance or noncompliance with the laws under which the land was entered. Neither of the witnesses may be present while the testimony of the claimant is being given.

1. Name of Claimant (first, middle initial, and last)		Address (include zip code)	Age
2a. Are you a citizen of the United States? <input type="checkbox"/> Yes <input type="checkbox"/> No			
b. If "no," have you filed a declaration of intention? <input type="checkbox"/> Yes <input type="checkbox"/> No (If "yes," complete the following)			
Give Date	Name of Court	City	
c. Has evidence of naturalization been submitted with? <input type="checkbox"/> Entry Number <input type="checkbox"/> Final proof			
d. Give marital status <input type="checkbox"/> Single <input type="checkbox"/> Married <input type="checkbox"/> Widowed <input type="checkbox"/> Divorced			Date of Marriage
e. List members of family living with you			

3. Are you entitled to credit for military service (43 CFR 2033)? ☐ Yes ☐ No
(If "yes," complete the following)

Name of Veteran		Relationship to Claimant	
Branch of service	Serial number	DATE	
		Induction	Discharge
Type of discharge	Is certified copy of discharge attached? <input type="checkbox"/> Yes <input type="checkbox"/> No		

- 4a. Are you the person who made the homestead entry (entries) noted above? ☐ Yes ☐ No
- b. If you hold this entry, by assignment, give name of entryman and your relationship to him

5. Give legal description of the lands included in the entry (entries) noted above

SECTION	TOWNSHIP	RANGE	MERIDIAN
---------	----------	-------	----------

6. If a married woman, did your husband hold an unperfected homestead during the period of residence claimed by you? ☐ Yes ☐ No (If "no," explain)

- 7a. Is the residence you claim made upon ☐ original entry ☐ additional entry
- b. When did you first establish residence? (Give month, day, and year)
- c. Are you making this proof for additional entry under Section 7 of the Enlarged Homestead Law? ☐ Yes ☐ No
- d. Did you own the original entry during entire period of residence? ☐ Yes ☐ No
- e. Are you making this proof for a contiguous additional entry? ☐ Yes ☐ No
- f. Have you submitted proof of required residence in connection with original entry? ☐ Yes ☐ No

8a. Have you a habitable house on the land?

☐ Yes ☐ No

b. Was the house built after residence was established?

☐ Yes ☐ No

c. Where did you reside before the house was completed?

9a. PERIODS OF ACTUAL RESIDENCE ON THE HOMESTEAD LAND

YOU RESIDED ON THE LAND			YOUR FAMILY RESIDED ON THE LAND	
RESIDENCE YEAR *	FROM (Month, day, and year)	TO (Month, day, and year)	FROM (Month, day, and year)	TO (Month, day, and year)

9b. PERIODS OF ABSENCES FROM THE HOMESTEAD LAND AND REASONS

RESIDENCE YEAR *	FROM (Month, day, and year)	TO (Month, day, and year)	WHO WAS ABSENT, (Specify claimant, "family," or "both")	REASON FOR ABSENCE

10. CHARACTER OF LAND EMBRACED IN THE HOMESTEAD

SECTION	LEGAL SUBDIVISION	GENERAL CHARACTER OF LAND	NUMBER OF ACRES			BOARD FEET OF SAW TIMBER	
			NOW CULTI- VATED	NOT CULTIVATED BUT CULTIVABLE			CONTAIN- ING TREES OR BRUSH
				Profitably	Otherwise		

11. ACTUAL AGRICULTURAL USE OF THE HOMESTEAD LAND

CALENDAR YEAR	KIND OF CROP PLANTED	NO. OF ACRES CULTIVATED	QUANTITY OF CROP HARVESTED	EXTENT OF GRAZING USE OF LAND			REASON FOR CULTIVATING LESS ACREAGE THAN REQUIRED BY LAW
				NO. OF MONTHS	ANIMALS		
					Kind	Number	

12a. IMPROVEMENTS PLACED ON THE HOMESTEAD LAND

SECTION	LEGAL SUBDIVISION	DESCRIPTION OF IMPROVEMENTS	YEAR MADE	VALUE OF MATERIALS	VALUE OF LABOR	TOTAL VALUE
				\$	\$	\$
				\$	\$	\$
				\$	\$	\$
				\$	\$	\$
				\$	\$	\$

b. Give estimated present value of improvements placed on the homestead

\$

* The first "residence year" begins with the day on which residence was first established

13. Is your homestead within the limits of an incorporated town or selected site of a city or town? ☐ Yes ☐ No

14. Is your homestead used for trade or business? ☐ Yes ☐ No (If "yes," explain)

15. Are there indications of minerals of any kind on your homestead? ☐ Yes ☐ No (If "yes," explain)

16. Have you sold, conveyed, agreed to sell or convey, or optioned, mortgaged, or agreed to option or mortgage the land in your homestead, or any part thereof? ☐ Yes ☐ No (If "yes," give names of parties to the transaction, date, amount, and purpose of transaction)

17. Have you ever made another homestead entry? ☐ Yes ☐ No (If "yes," give land office, entry numbers, and land description)

18. Do you own any other lands? ☐ Yes ☐ No (If "yes," list by legal subdivision)

19. Was either of the witnesses present while you were giving the above testimony? ☐ Yes ☐ No

20. Did either of the witnesses inform you of their testimony in connection with this proof? ☐ Yes ☐ No

I CERTIFY That residence and agricultural use of the land has been performed as set forth in my testimony; that no part of said land has been transferred or conveyed to any other person, or otherwise alienated except provided in Section 2288 of the Revised Statutes; that I will bear true allegiance to the Government of the

United States; and, I have not heretofore perfected or abandoned an entry made under the homestead laws of the United States. I FURTHER CERTIFY That the statements made by me in this proof are true, complete, and correct to the best of my knowledge and belief and are made in good faith.

(Date)

(Sign full name)

Title 18 U.S.C. Section 1001, makes it a crime for any person knowingly and willfully to make to any department or agency of the United States any false, fictitious, or fraudulent statements or representations as to any matter within its jurisdiction.

I HEREBY CERTIFY That the claimant was examined separately and apart from the witnesses in this case; that the foregoing deposition and affidavit were read to or by the claimant and affiant in my presence before he or she affixed signature thereto; that I verily believe claimant and affiant to be a creditable person and the identical person hereinbefore described, and that said deposition and affidavit were duly subscribed and sworn to me at my office in the town

of _____, County of _____

in the State of _____ within the _____ land district,

this _____ day of _____, 19 _____

(Signature)

(Official Designation)

7. CHARACTER OF LAND EMBRACED IN THE HOMESTEAD

LEGAL SUBDIVISION	GENERAL CHARACTER OF THE LAND	NUMBER OF ACRES			BOARD FEET OF SAW TIMBER
		NOW CULTIVATED	NOT CULTIVATED BUT CULTIVABLE	CONTAINING TREES	

8. ACTUAL AGRICULTURAL USE OF THE HOMESTEAD LANDS

YEAR	ACRES CULTIVATED	KIND OF CROP PLANTED	EXTENT OF GRAZING USE OF LAND

9a. IMPROVEMENTS PLACED ON THE HOMESTEAD LANDS

SECTION	LEGAL SUBDIVISION	DESCRIPTION OF IMPROVEMENTS	YEAR MADE	VALUE		TOTAL VALUE
				MATERIAL	LABOR	
				\$	\$	\$
				\$	\$	\$
				\$	\$	\$
				\$	\$	\$
				\$	\$	\$

9b. What is estimated present value of improvements placed on the homestead?

\$

10a. LAND TREATMENTS INCREASING PRODUCTIVITY OF HOMESTEAD LANDS

YEAR	SECTION	LEGAL SUBDIVISION	NUMBER OF ACRES					VALUE OF WORK
			CULTIVATED	IRRIGATED	CLEARED	SEEDED TO GRASS	OTHERWISE TREATED	
								\$
								\$
								\$
								\$
								\$

10b. Give brief description of above treatment measures

11. Are there minerals of any kind on the land? ☐ Yes ☐ No (If "yes," explain)

12. Do you know or have you information that the entryman has sold, conveyed, agreed to sell or convey, or optioned, mortgaged, or agreed to option or mortgage the land in the homestead, or any part thereof? ☐ Yes ☐ No (If "yes," give name of parties to the transaction, date, amount, and purpose of transaction)

13a. Do you have any interest in this land? ☐ Yes ☐ No (If "yes," explain)

b. Are you related to the entryman? ☐ Yes ☐ No

14. Do you have personal knowledge that the entryman and his family actually resided upon and cultivated the land each year in accordance with your testimony? ☐ Yes ☐ No

15a. Was the entryman present while you were giving the above testimony? ☐ Yes ☐ No

b. Was the other witness present while you were giving the above testimony? ☐ Yes ☐ No

c. Do you have any actual knowledge of any statement made by either the entryman or the other witness in their testimony in connection with this proof? ☐ Yes ☐ No (If "yes," specify)

I CERTIFY That the statements made herein are true, correct and complete to the best of my knowledge and belief and are made in good faith.

(Date)

(Sign full name)

Title 18 U.S.C. Section 1001, makes it a crime for any person knowingly and willfully to make to any department or agency of the United States any false, fictitious, or fraudulent statements or representations as to any matter within its jurisdiction.

I HEREBY CERTIFY That the witness was examined separately and apart from the other witnesses in the case; that the foregoing deposition was read to or by the witness in my presence before witness affixed signature thereto; that I verily believe witness to be the identical person hereinbefore described, and that said deposition was duly subscribed and sworn to before me at my office, in (town)

in the County of

State of

within the

land district,

this day of

, 19

(Signature)

(Official Designation)

"Reclamation Homestead Application For Farm Unit"

Reclamation Instructions

Series 210 Land

Part 216 Land Settlement

CHAPTER 1 PUBLIC AND ACQUIRED LAND

Figure
Par. 21.1

APPLICATION FOR FARM UNIT

Form No. 7-511 Nov. 1953		FORM APPROVED BUDGET BUREAU NO. 42-R966.2 DO NOT FILL IN	
UNITED STATES DEPARTMENT OF THE INTERIOR BUREAU OF RECLAMATION APPLICATION FOR FARM UNIT		Application Number	
		Date of Application	
PUBLIC NOTICE NO.			
(Print or type full name)		Veteran's Preference (as set forth in Sec. 3 of Public Notice)	
(Last)	(First)	(Middle)	<input type="checkbox"/> I claim Veteran's preference.
Street, Route or Box No.			<input type="checkbox"/> I do not claim Veteran's preference.
City	Zone	State	
<p>I hereby submit this application for inclusion in the public drawing for one of the farm units described in the above-named notice.</p> <p>I certify that I have read the Public Notice, that I am familiar with the qualifications required of applicants, and that I can meet all these requirements.</p> <p>I agree to comply with the terms of this Public Notice and, if my name is drawn as set forth in the Notice, I will submit such additional information and corroborating evidence as may be requested by the Examining Board.</p>			
Signature of Applicant			Date Signed
DO NOT FOLD			DO NOT FOLD

Project name, Public Notice No., and date to be filled in for each land opening by special printing. Card to be addressed to office receiving applications.

7/26/57

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Reclamation Instructions

Part 216 Land Settlement

Series 210 Land

Figure 4
Part 216.1.12

CHAPTER 1 PUBLIC AND ACQUIRED LAND

APPLICATION FOR FARM UNIT

FCRM NO. 7-511a REV. 1959		FORM APPROVED	
UNITED STATES DEPARTMENT OF THE INTERIOR BUREAU OF RECLAMATION		BUDGET BUREAU NO. 42-R1085.1 DO NOT FILL IN	
APPLICATION FOR FARM UNIT		APPLICATION NUMBER	
PUBLIC ANNOUNCEMENT NO.		DATE OF APPLICATION	
PROJECT OR TRACT FULL NAME		VETERAN'S PREFERENCE (as set forth in section 3 of Public announcement)	
Last First Middle		<input type="checkbox"/> I claim veteran's preference	
STREET, ROUTE OR BOX NO.		<input type="checkbox"/> I do not claim veteran's preference	
City Zone State			
I hereby apply for the right to purchase one of the farm units described in the above-named Public Announcement.			
I certify that I have read the public announcement, that I am familiar with the qualifications required of applicants, and that I can meet all these requirements.			
I agree to comply with the terms of this public announcement and, if my name is drawn as set forth in the announcement, I will submit such additional information and corroborating evidence as may be requested by the Examining Board.			
SIGNATURE OF APPLICANT		DATE SIGNED	

Project name, Public Announcement No. and date to be filled in for each land sale by special printing. Card to be addressed to office receiving applications.

7/26/57

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Reclamation Instructions

Series 210 Land

Part 216 Land Settlement

CHAPTER 1 PUBLIC AND ACQUIRED LAND

Fig. 5, Sheet 1
Par. 216.113

EVIDENCE OF QUALIFICATION OF FARM APPLICANT

7-5110
(5-56)

FORM APPROVED
BUDGET BUREAU NO. 82-81105.1

Public Notice No. and date to be filled in for each land opening by special printing.

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

APPLICANT - DO NOT
FILL IN THIS ITEM

APPLICATION NO.

EVIDENCE OF QUALIFICATION OF FARM APPLICANT

The information required on this form is to be submitted in connection with your application for entry on one of the farm units described in Public Notice dated _____. Before filling out the form, study carefully the public notice and instructions on last page of this form.

SECTION I - GENERAL

1. APPLICANT'S FULL NAME (print or type)

2. APPLICANT'S POST OFFICE ADDRESS

3. SEX

4. DATE OF BIRTH
(month, day, year)

5. PLACE OF BIRTH

6. AGE

7. MARITAL STATUS

8. ARE YOU THE HEAD OF A FAMILY (as defined in Subsection 6(d) of Public Notice.) This item to be filled in only if applicant is a married woman or a person less than 21 years of age who is not entitled to veteran's preference.

☐ SINGLE

☐ MARRIED

☐ YES

☐ NO

9. CITIZENSHIP (See Section 8a of Public Notice.)

9a. ARE YOU A NATIVE BORN CITIZEN OF THE UNITED STATES?

9b. HAVE YOU BEEN NATURALIZED? (Fill in if not a native born citizen. If "yes" fill in 9d below.)

☐ YES

☐ NO

9c. HAVE YOU DECLARED YOUR INTENTION TO BECOME A CITIZEN OF THE U.S.? (Fill in if not native born or naturalized. If "yes" fill in 9d below.)

☐ YES

☐ NO

☐ YES

☐ NO

9d. NUMBER AND DATE OF CERTIFICATE OF NATURALIZATION OR DECLARATION OF INTENT TO BECOME A CITIZEN.

10. VETERAN'S PREFERENCE (See instructions on last page of this form and Sections 3 and 4 of Public Notice.)

10a. DO YOU CLAIM VETERAN'S PREFERENCE?

☐ YES

☐ NO

10b. CLASS OF PREFERENCE CLAIMED (Check proper box)

☐ VETERAN OF WORLD WAR II

☐ WIDOW OF A VETERAN OF WORLD WAR II

☐ VETERAN OF:
WAR WITH GERMANY (1917 - 1921)
WAR WITH SPAIN
PHILIPPINE INSURRECTION

☐ SPOUSE OF A VETERAN OF WORLD WAR II

☐ GUARDIAN OF THE MINOR CHILDREN OF A VETERAN OF WORLD WAR II

11. DO YOU OWN LAND AT PRESENT? (If "yes" where is it located?)

☐ YES

☐ NO

11b. HAVE YOU EVER HOMESTEADED ON PUBLIC LAND? (If "yes" explain on back of this form the final disposition of your entry.)

☐ YES

☐ NO

11b. IF YOU OWN LAND IS IT ON A FEDERAL RECLAMATION PROJECT? (If "yes" give name of project.)

☐ YES

☐ NO

11c. CROP ACREAGE

11d. TOTAL ACREAGE

12. HEALTH. ARE YOU IN SUCH PHYSICAL CONDITION AS WILL ENABLE YOU TO ENGAGE IN NORMAL FARM LABOR? (If physically disabled or afflicted with any condition which makes your ability to perform normal farm labor questionable, attach a detailed statement from an examining physician which defines the limitation on such ability and its causes.)

☐ YES

☐ NO

13. REFERENCES (List five responsible individuals who are qualified and willing to certify to your character, industry, and experience. Do not list relatives or persons under 21 years of age. See instructions.)

	NAME AND COMPLETE CURRENT ADDRESS	OCCUPATION	POSITION OR TITLE
1			
2			
3			
4			
5			

NOTES: It is agreed that information furnished the United States, in writing or otherwise, by the above-named persons given as references shall be treated as confidential. The applicant, for himself and his successors and assigns, hereby waives any right which he might have or claim to have for damages or otherwise against any of the said persons on account of the information so furnished.

To be used only for Land openings under Boulder Canyon Project Act.

Reclamation Instructions

Part 216 Land Settlement

Series 210 Land

5, Sheet 2
216.1.13

CHAPTER 1 PUBLIC AND ACQUIRED LAND

EVIDENCE OF QUALIFICATION OF FARM APPLICANT (Continued)

SECTION II - ASSETS AND LIABILITIES (See Subsection 7d of Public Notice.)			
ASSETS - PERSONAL AND REAL PROPERTY (Describe below and give number and amount)		WHERE IS PROPERTY LOCATED	CASH VALUE ON PRESENT MARKET
1. PERSONAL PROPERTY (Farm equipment, supplies, livestock, farm products, household goods, etc.)			
1a.			
1b.			
1c.			
2. FARM LAND			
3. OTHER REAL ESTATE (City property, etc.)			
3a.			
4. TOTAL PERSONAL AND REAL PROPERTY (Sum of Lines 1 thru 3a)			
ASSETS - INSURANCE, SECURITIES, CASH, ETC.		AMOUNT	PRESENT CASH VALUE
5. LIFE INSURANCE			
6. SECURITIES (Bonds, stock, etc.)			
7. ACCOUNTS DUE APPLICANT (Describe)			
8. CASH ON HAND OR ON DEPOSIT (Not credit)			
9. TOTAL VALUE OF INSURANCE, SECURITIES, CASH, ETC. (Sum of Lines 5 thru 8)			
LIABILITIES (Include all indebtedness on property listed on Lines 1 thru 3a)		ITEM MORTGAGED	DATE DUE
			AMOUNT
10. NOTES SECURED BY MORTGAGES (Name of creditor)			
10a.			
11. NOTES NOT SECURED BY MORTGAGES (Name of creditor)			
11a.			
12. OTHER OBLIGATIONS (Describe)			
13. TOTAL LIABILITIES (Sum of Lines 10 thru 12)			
14. ASSETS - TOTAL VALUE PERSONAL AND REAL PROPERTY (Total shown on Line 4)			
15. ASSETS - TOTAL VALUE INSURANCE, SECURITIES, CASH, ETC. (Total shown on Line 9)			
16. TOTAL ASSETS (Sum of Lines 14 and 15)			
17. TOTAL LIABILITIES (Total shown on Line 13)			
18. NET WORTH (Line 16, minus Line 17)			

VERIFICATION OF APPLICANT'S FINANCIAL STATEMENT (To be made by an officer of a bank or other reputable credit agency)

I have examined the financial statement of the above-named Applicant as set forth in Section II of this form, and have made the necessary inspections, investigations, and appraisals. Accordingly, I certify that, to the best of my knowledge and belief, the applicant's statement is a true statement of his financial condition.

EXCEPTION OR REMARKS

OFFICIAL SIGNATURE	TITLE	DATE SIGNED
NAME AND ADDRESS OF BANK OR CREDIT AGENCY		

Reclamation Instructions

Series 210 Land

Part 216 Land Settlement

CHAPTER 1 PUBLIC AND ACQUIRED LAND

Fig. 5, Sheet
Par. 216.1.3

EVIDENCE OF QUALIFICATION OF FARM APPLICANT (Continued)

SECTION III - EDUCATION AND FARM EXPERIENCE (See Section 7 of Public Notice)															
1. EDUCATION (Circle highest grade completed)												COLLEGE			
1	2	3	4	5	6	7	8	9	10	11	12	1	2	3	4
2. COLLEGE AGRICULTURAL TRAINING															
NAME AND LOCATION OF COLLEGE										YEARS ATTENDED (Month and year)		NO. OF ACADEMIC YEARS	MAJOR AGRICULTURAL COURSES COMPLETED		
										FROM	TO				
3. TECHNICAL AGRICULTURAL EXPERIENCE (Such as teaching vocational agriculture, agricultural extension work, field supervision of production and marketing of agricultural products, etc.)															
EMPLOYER - NAME AND ADDRESS				JOB TITLE OR DESCRIPTION				DATES EMPLOYED (Month and year)							
								FROM	TO	TOTAL MONTHS					
4. FARM EXPERIENCE (Actual farm experience since reaching the age of 15. See Subsection 6b of the Public Announcement.)															
FARM EXPERIENCE (List farm owner or employer's names below)				SIZE OF FARM (ACRES)	TYPE OF FARMING *	STATE AND COUNTY	DATES MONTH AND YEAR								
							FROM	TO							
A. LIVING AND WORKING ON A FARM WHILE ATTENDING SCHOOL															
B. AS FARM LABORER FULL TIME															
C. AS FARM MANAGER FULL TIME															
D. FOR YOURSELF FULL TIME	AS OWNER														
	AS RENTER OR SHARECROPPER														
E. COLLEGE TRAINING IN AGRICULTURE (From Item 2 above)															
F. TECHNICAL AGRICULTURAL EXPERIENCE (From Item 3 above)															

*Under type of farming, list diversified, dairy, fruit, livestock, grain, or poultry, etc.

(Attach additional sheets, if necessary)

Reclamation Instructions

Part 216 Land Settlement

Series 210 Land

5, Sheet 4
216.1.13

CHAPTER 1 PUBLIC AND ACQUIRED LAND

EVIDENCE OF QUALIFICATION OF FARM APPLICANT (Continued)

DECLARATION BY APPLICANT

I declare under the penalties of perjury that (a) I am the person who subscribed the foregoing; (b) my post office address is as stated at the head of this form; (c) my application is made in my own behalf and not at the instances or for the benefit, directly or indirectly, of any other person or any firm, association, or corporation; (d) my present assets and liabilities are fully stated in this form and all my other statements therein are true; (e) that I have read and am willing to comply with all the terms and conditions as specified in the public notice, especially those relating to payment of the charges therein mentioned.

SIGNATURE OF APPLICANT

INSTRUCTIONS

1. Use space below to answer any of the questions on the form, if you need more space. Number these entries to agree with the number of the question.
2. Special Requirements for Items 10a, 10b, and 13.

Questions 10a and 10b. Veteran's Preference. If you claim veteran's preference, attach a complete photostatic or other copy of certificate of honorable discharge (both sides), or of an official document of the respective branch of the service which shows clearly an honorable discharge as defined in Section 4 of the public notice, or constitutes evidence of other facts on which claim for preference is based, and which clearly shows the period of service. Because proof of veteran's preference cannot be returned, original discharge papers should not be submitted. If preference is claimed by a surviving spouse or on behalf of the minor child or children of a deceased veteran, attach proof of relationship asserted and of the veteran's service and death. If preference is claimed by the spouse of a living veteran, attach proof of such relationship and the veteran's service and written consent to the exercise of such preference right.

Question 13. References. Give the names and addresses of five responsible individuals who are qualified and willing to certify as to your experience, character, and industry. The enclosed reference forms (Form 7-514) should be properly filled out, signed, and returned, by at least three of the persons listed. One of these three persons must be an agricultural leader who holds one or more of the following positions: County Agent; Farmers Home Administration County Supervisor; Production and Marketing Administration County Committeeman; Soil Conservationist; Vocational Agricultural Teacher; Manager or Agricultural Representative of an agricultural marketing or processing association or institution; Loan Office or Agricultural Representative of a credit agency or institution; or an officer of any recognized farm organization. The other two must be agricultural leaders or successful farmers. Do not list relatives or persons under 21 years of age.

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

FORM APPROVED
BUDGET BUREAU NO. 42-R968.1

Land Office

Serial Number

DESERT LAND ENTRY APPLICATION

1. Name (first, middle initial, and last)

Address (street and number, city and State)

hereby applies to enter, under the Desert Land Act for the purpose of reclaiming the lands by permanent irrigation and cultivation within 4 years of allowance of this application, the public lands described as follows:

TOWNSHIP	RANGE	MERIDIAN	SECTION	SUBDIVISION

State of

containing a total of _____ acre

2. Enclose filing fee of \$15 plus advance payment \$ _____, Total \$ _____

3a. Are you 21 years of age or older? ☐ Yes ☐ No

b. Of what State are you a bona fide resident?

c. What is your business or occupation?

d. Citizenship: Are you ☐ native born ☐ naturalized?

Naturalization: Date
in (city and State)

in the Court of

Have you filed a Declaration of Intention to become a citizen of the United States? ☐ Yes ☐ No (If "yes," attach full details)

e. Are you ☐ married ☐ single ☐ male ☐ female (if female, see instruction no. 3e)

f. Are you an employee, the spouse, or an agent of an employee of the Department of the Interior? ☐ Yes ☐ No

4. Have you read the instructions attached to this form? ☐ Yes ☐ No

5a. Have you made any other application under the Desert Land Act? ☐ Yes ☐ No (If "yes," give Land Office and serial number)

b. Have you ever received by assignment any lands under the Desert Land Act? ☐ Yes ☐ No (If "yes," give Land Office and serial number)

c. Have you entered, acquired title, or are you now claiming under entries under any of the nonmineral public land laws since August 30, 1890? (If so, state total number of acres)

6a. Have you made a personal on-the-ground examination of every legal subdivision of the above described land? ☐ Yes ☐ No

b. Are the lands essentially nonmineral? ☐ Yes ☐ No

- c. To your knowledge, is there within the limits of any of the legal subdivisions applied for any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal, placer deposits, other valuable mineral deposit, salt deposit, or salt springs? ☐ Yes ☐ No (If "yes," specify)
- d. Do you or any other person or persons work the lands for minerals during any part of the year? ☐ Yes ☐ No (If "yes," give names and details)
- a. Have you examined the county records? ☐ Yes ☐ No
- b. Have you found the land to be covered by a mining claim or other claim of record under the United States mining laws or the mining laws of the State? ☐ Yes ☐ No (If "yes," explain)
- a. Are any of the lands applied for known or classified as valuable for minerals or timber? ☐ Yes ☐ No
- b. Is this application made to obtain title to lands that can be feasibly used for the production of agricultural crops without being reclaimed by conducting water thereto? ☐ Yes ☐ No
- c. Are the lands applied for occupied or improved by yourself or any other person, association, or corporation? ☐ Yes ☐ No (If "yes," specify)
- a. Are the lands applied for irrigated or watered, or overflowed at any season of the year? ☐ Yes ☐ No (If "yes," specify)
- b. Will the lands produce an agricultural crop of any kind in an amount reasonably remunerative above cost of production without artificial irrigation? ☐ Yes ☐ No
- c. Will the lands produce native grasses sufficient in quantity to warrant the harvesting of an ordinary cutting of hay in the usual manner? ☐ Yes ☐ No
- d. Are there trees of commercial timber species on the lands? ☐ Yes ☐ No
- e. Are the lands essentially dry and arid, unfit for the production of farm crops without irrigation? ☐ Yes ☐ No
- f. Has the land recently been reclaimed by conducting water on any portion of any legal subdivision applied for? ☐ Yes ☐ No
- g. Are there any lands in the vicinity of the lands applied for that are occupied or used by farmers and cultivated for the production of farm crops without artificial irrigation? ☐ Yes ☐ No
- h. Are the soil characteristics of each legal subdivision shown on Exhibit No. 1 - "Soil Characteristics"? ☐ Yes ☐ No
- i. Are the irrigation requirements shown on Exhibit No. 2 - "Irrigation Requirements"? ☐ Yes ☐ No

12. Have you attached and made a part of this application, the following:

a. Exhibit No. 3 - "Plan of Irrigation"? ☐ Yes ☐ No

1. Location of the entry lands by legal description? ☐ Yes ☐ No

2. Topography, shown by contour interval of 10 feet or less as shown on the exhibit? ☐ Yes ☐ No

3. Location and source of permanent water supply, peak and sustained discharge in acre feet, for irrigation periods during the average irrigation season? ☐ Yes ☐ No

4. Location, type, size, and gradient in percent, of all water distribution ditches and laterals necessary to irrigate all irrigable portions of each legal subdivision adequately? ☐ Yes ☐ No

5. Location, type, size, and dimensions of all other installations necessary for the irrigation of the lands? ☐ Yes ☐ No

b. A map which is an accurate and detailed representation of the proposed irrigation system to be used in the permanent reclamation and production of agricultural crops in this entry? ☐ Yes ☐ No

13a. Is there adequate water supply of suitable quality available to you for the irrigation of all the irrigable portions of the lands applied for? ☐ Yes ☐ No

b. Did you acquire by appropriation, purchase, or contract, a right to the permanent use of sufficient water to irrigate and reclaim permanently all of the irrigable portions of each of the legal subdivisions applied for? ☐ Yes ☐ No

(If "yes," you must present as evidence and make a part of this application certified copies, in duplicate of document establishing such water right)

c. Does the State of (insert name of State where entry is sought) grant permit rights to appropriate water before the land embraced in an application is classified as suitable for Desert Land Entry or the Entry is allowed? ☐ Yes ☐ No

d. Do you submit attached evidence from the State showing that you are qualified under State law to secure such permit or right? ☐ Yes ☐ No

e. Have you initiated and prosecuted, as far as now possible, appropriate steps looking to the acquisition of such an appropriation, purchase, or contract? ☐ Yes ☐ No

f. Have you attached evidence demonstrating that there is an adequate water supply of suitable quality available to you to reclaim permanently all the irrigable portions of the lands applied for? ☐ Yes ☐ No

14a. Is the reclamation and permanent cultivation of this entry economically sound? ☐ Yes ☐ No

b. Have you attached, in duplicate, Exhibit No. 4 which in detail presents the economic justification of this entry? ☐ Yes ☐ No

c. Does the attached analysis clearly show the economic feasibility of the entry in relation to agricultural development of near and adjacent lands? ☐ Yes ☐ No

d. Does it show the accessibility to the produce market? ☐ Yes ☐ No

e. Does it show the initial and continuing annual operations and production costs? ☐ Yes ☐ No

f. Is the anticipated yearly net return based on present and anticipated future cost-price relationships shown? ☐ Yes ☐ No

- 15a. Are the lands applied for in as compact form as possible? ☐ Yes ☐ No
- b. Are the tract or tracts applied for contiguous or sufficiently close to each other so as to be managed satisfactorily as an economic farm unit? ☐ Yes ☐ No
- c. Have you attached, in duplicate, Exhibit No. 5 as a part of this application giving clear and precise justification as to the economic feasibility of including those legal subdivisions not contiguous? ☐ Yes ☐ No

6. If you had assistance in completing this application give the following information:

NAME AND ADDRESS	ASSISTANCE GIVEN	DATE

CERTIFY That all of the statements made by me in this application and the attachments submitted as a part of this application are true, complete, and correct to the best of my knowledge based upon my personal examination of the lands applied for, and other investigations which I have personally made; that the statements which I have made in this application are made in good faith; and that they have not been made for me by any agent or representative; and that I signed this application in the land district in which the above-described land is located.

(Date) _____ (Signature of applicant) _____

Article 18, U.S.C., section 1001, makes it a crime for any person knowingly and wilfully to make to any department or agency of the United States any false, fictitious or fraudulent statements or representations as to any matter within its jurisdiction.

CAUTION TO APPLICANTS

Land Locators and Land Filing Services are in no way connected with the U. S. Bureau of Land Management and they cannot make any commitments or promises for the Bureau regarding the Federal lands or resources administered by the Bureau. Therefore, if you have consulted, or are filing your application through a Land Locator or Filing Service it may be to your advantage to check with a local Better Business Bureau, Chamber of Commerce, or similar organization to ascertain that the individual or firm you are dealing with is reliable and does not charge excessive fees for services rendered.

NOTE

The land applied for must be classified under section 7 of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1272; 43 U.S.C. 315f), as amended, before this application may be allowed.

EXHIBIT NO. 1 - SOIL CHARACTERISTICS
(List each legal subdivision separately)

SECTION	LEGAL SUBDIVISION	SLOPE IN PERCENT	CHARACTER OF SURFACE	TEXTURE	DEPTH OF TOP SOIL	RELATIVE SALINITY OR ALKALINITY	CHARACTER OF SUBSOIL	ACRES
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)

EXHIBIT NO. 2 - IRRIGATION REQUIREMENTS

(1) Total acreage irrigable	acres
(2) Crops to be grown:	acres
Type of crop	
Type of crop	acres
Type of crop	acres
(3) Water requirements per acre	acre feet
(4) Source of water	
(5) Well data:	feet
(a) Depth of static water	
(b) Diameter of well	inches
(c) Cost of completed well	dollars
(d) Pump requirement	horsepower
(e) Type of pump	
(f) Cost of pump	dollars
(6) Cost of sprinkler system	dollars
(7) Costs of levelling, ditches, and canals	dollars
(8) Costs of other installations	dollars

EXHIBIT NO. 4 - ESTIMATED ANNUAL FARM BUDGET

Estimated Production Costs:	
Seed and fertilizer	\$
Farm automobiles and trucks *	
Machinery and tractors*	
Irrigation system*	
Water charges	
Farm buildings, fences, and other improvements used in operation of farm, not including irrigation system and residence*	
Cash wages to hired labor	
Interest on borrowed money	
Taxes on farm real estate	
Cost of marketing (<i>trucking, storage, treatment, etc.</i>)	
Other	
TOTAL COSTS	
Estimated Income:	
Estimated production (	) times price per unit (\$) = \$
NET INCOME	\$
Costs of operation, including depreciation and maintenance	

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

STATEMENT OF WITNESS

I

of

certify that I am well acquainted with the character of each and every legal subdivision or portion of the land described in the foregoing application, which said application has been read to me; that I became acquainted with said land by personal and careful examination of each and every legal subdivision or portion thereof on (date(s) of examination) , 19 ; that I have been acquainted with it for about that my knowledge of the land is such as to enable me to testify understandingly concerning it; that same is de nonmineral land; and that each and every statement made by applicant in the foregoing application as to the condition, character, and situation of said land is true of my own personal knowledge; and I further state that I am not interested in any way or manner, directly or indirectly, present or prospective, in the applications in support of which this statement is made, nor in the land itself, nor in any title thereto which may be acquired by said applicant or any other person, and that I signed this statement in the land district in which the above-described land is located.

(Date)

(Signature of Witness)

Title 18, U.S.C., Section 1001, makes it a crime for any person knowingly and willfully to make to any department or agency of the United States any false, fictitious, or fraudulent statements or representations as to any matter within its jurisdiction.

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

STATEMENT OF WITNESS

I
of
certify that I am well acquainted with the character of each and every legal subdivision or portion of the land described in the foregoing application, which said application has been read to me; that I became acquainted with said land by personal and careful examination of each and every legal subdivision or portion thereof on (date(s) of last examination) , 19 ; that I have been acquainted with it for about years, that my knowledge of the land is such as to enable me to testify understandingly concerning it; that same is desert, nonmineral land; and that each and every statement made by applicant in the foregoing application as to the condition, character, and situation of said land is true of my own personal knowledge; and I further state that I am not interested, in any way or manner, directly or indirectly, present or prospective, in the applications in support of which this statement is made, nor in the land itself, nor in any title thereto which may be acquired by said applicant or any other person, and that I signed this statement in the land district in which the above-described land is located.

(Date)

(Signature of Witness)

Title 18, U.S.C., Section 1001, makes it a crime for any person knowingly and willfully to make to any department or agency of the United States any false, fictitious, or fraudulent statements or representations as to any matter within its jurisdiction.

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

FORM APPROVED
BUDGET BUREAU NO. 42-R1300

DESERT LAND ENTRY ANNUAL PROOF

Land Office _____

Serial Number _____

Testimony of Witness

(Read Instructions Before Completing Form)

1. Name of Entryman _____
(First) (Middle) (Last)
2. Address of Entryman _____
(Full Post Office Address)
3. Name of Witness _____
(First) (Middle) (Last)
4. Address of Witness _____
(Full Post Office Address)
5. Description of lands _____, Sec. _____, T. _____, R. _____,
(Legal Subdivision) _____ Meridian, State of _____, Acres _____.
6. _____ Year Proof.
(1st, 2d, or 3d)
7. I CERTIFY that I am well acquainted with the above-described lands and entry and that from personal examination I know that during the _____ year after date of said entry, there were expended for the ultimate reclamation of said land, the amounts set forth and itemized below:

PURPOSE OF EXPENDITURE	LOCATION OF IMPROVEMENTS	AMOUNT EXPENDED
Construction of <input type="checkbox"/> reservoirs, <input type="checkbox"/> dams, <input type="checkbox"/> canals, <input type="checkbox"/> ditches, <input type="checkbox"/> laterals, <input type="checkbox"/> wells, for use in irrigating said land (check the items claimed)		\$
Materials and machinery used in construction of		
Materials and machinery installed for		
Fences		
First clearing or breaking of acres		
Surveying of		
Cash payment for stock in water company (attach receipt with this Form)		
Other expenditures (specify) and Remarks (length and capacity of ditches, etc.)		
TOTAL	X X X X X	\$

(Date)

(Signature of Witness)

18 U.S.C., sec. 1001, makes it a crime for any person knowingly and willfully to make to any Department or agency of the United States any false, fictitious, or fraudulent statements or representations as to any matter within its jurisdiction.

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

DESERT LAND ENTRY FINAL PROOF

(Act of March 3, 1877 (19 Stat. 377; 43 U.S.C. 321-323), as Amended)

FORM APPROVED
BUDGET BUREAU NO. 42-R1293

Land Office

Serial Number

1. Name	Address
---------	---------

2. Citizenship: Native Born ☐ Naturalized ☐ Legal Residence

3. Description of Land in Entry:

4. WATER SUPPLY

(a) Source:

(b) Volume:

(c) Method of Acquisition:

(d) Method of Maintenance:

5. IMPROVEMENTS

a. Year	b. Type of Improvements Constructed	c. Cost of Improvements

6. AGRICULTURAL CROPS (EXCLUDING HAY) PLANTED AND IRRIGATED ON THE LAND

a. Year	b. Kind of Crop	c. Number of Acres	d. Average Yield Per Acre

HAY PRODUCED ON THE LAND AS A RESULT OF IRRIGATION

[illegible]

9. Irrigation and Cultivation (See next page for information required)

10. Non-Irrigable Lands:

11. Reasons for delay in proof:

12. I HEREBY CERTIFY that the statements made herein are true, complete, and correct to the best of my knowledge and belief, and are made in good faith.

(Signature)

I HEREBY CERTIFY that the foregoing statement was read to or by the affiant in my presence and separately and apart from the other affiants; that affiant is to me personally known (or has been satisfactorily identified before me) and that said statement was duly subscribed and sworn to before me, at my office, in

(County and State)

within the _____ land district, this _____ day of _____, 19____

9. IRRIGATION AND CULTIVATION

(a) Legal Subdivision	(b) Total Acres Irrigable	(c) Total Acres Nonirrigable	(d) Total Acres Irrigated	(e) Acres Irri- gable from Ditches	(f) Acres Irri- gable by Sprinkler System	(g) Dates of Irrigation	(h) Duration of Distribution	(i) Quantity of Water Per Acre	(j) Acres Tilled		(k) Ditches	
									Irrigable	Nonirrigable	Number	Carrying Capacity

APPENDIX C

FEDERAL LEASE AND USE PERMIT FORMS

INDEX

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**DEPARTMENT OF THE ARMY
LEASE
FOR AGRICULTURAL OR GRAZING PURPOSES**

ON

MILITARY RESERVATION

No.

THIS LEASE, made between the Secretary of the Army, of the first part and

of the second part, WITNESSETH:

That the Secretary of the Army, by virtue of the authority contained in Title 10, United States Code, Section 2667, and for the consideration hereinafter set forth, hereby leases to the party of the second part, hereinafter designated as the lessee, for a term of
, beginning , 19 , and ending , 19
but revocable at will by the Secretary of the Army, the following described premises or prop-
erty for ***purposes only:***

THIS LEASE is granted subject to the following conditions:

1. That the lessee shall pay to the United States rental in the amount of (\$) per annum, payable in advance, and the lessee shall also pay to the United States on demand any sum which may have to be expended after the expiration, revocation, or termination of this lease in restoring the premises to the condition required by Condition No. 18 hereof. Compensation shall be made payable to the Treasurer of the United States and forwarded by the lessee direct to

2. That the lessee shall neither transfer nor assign this lease or any property on the demised premises, nor sublet the demised premises or any part thereof or any property thereon, nor grant any interest, privilege, or license whatsoever in connection with this lease without permission in writing from the Division or District Engineer

hereinafter designated as "said officer".

3. That the lessee has inspected and knows the condition of the leased property and it is understood that the same is hereby leased without any representation or warranty by the Government whatsoever, and without obligation on the part of the Government to make any alterations, repairs, or additions thereto.

4. That during the term of this lease, the lessee shall use said property for agricultural and/or grazing purposes and shall plant, cultivate, and harvest such crops on said property, and/or graze said property in accordance with the provisions of land-use regulations attached hereto and made a part hereof. He shall at all times maintain the property in good condition and free from weeds, brush, washes, and gullies detrimental to efficient farming operations or to the value of such property for agricultural or grazing use, and shall not commit or permit any unlawful acts, activities, or nuisances upon said property. He shall cut no timber, conduct no mining operations, remove no sand, gravel, or kindred substances from the ground, commit no waste of any kind, or in any manner substantially change the contour or condition of the property hereby leased, except changes required in carrying out soil and water conservation measures. Subject to the limitations of Condition No. 18 hereof with respect to the restoration of the property, all improvements used and occupied by the lessee under this lease shall at all times be protected and maintained in good order and condition by and at the expense of the lessee.

5. That in the event the United States revokes this lease or in any other manner materially reduces the area covered thereby or materially affects its use by the lessee prior to the date of expiration thereof, an equitable adjustment in the rental paid or thereafter to be paid under this lease shall be made, and the lessee shall have the right to harvest, gather, and remove from said land such crops as may have been planted or grown on said land, or, in the alternative, the said officer may require the lessee to vacate immediately and, if funds are available, compensation will be made to the lessee for the value of the crops remaining upon said land. Such adjustment of rental or right to harvest, gather, and remove said crops shall be evidenced by a supplemental agreement, in writing, executed by the said officer and the lessee: PROVIDED, HOWEVER, That none of the provisions of this paragraph shall apply in the event of revocation because of a breach by the lessee of any of the terms and conditions of this lease and the crops remaining upon said land shall become the property of the United States upon the effective date of such revocation.

6. That the lessee shall at all times exercise due diligence in the protection of the demised premises against damage or destruction by fire and other causes.

7. That the lessee shall not construct any permanent structure on the said premises and shall not construct any temporary structure or advertising sign thereon without the prior written consent of the said officer.

8. That the right is hereby reserved to the United States, its officers, agents and employees, to enter upon the said premises at any time for the purpose of inspection and inventory and when otherwise deemed necessary for the protection of the interest of the Government, and the lessee shall have no claim of any character on account thereof against the United States or any officer, agent or employee thereof.

9. That any property of the United States damaged or destroyed by the lessee incident to the lessee's use and occupation of the demised premises shall be promptly repaired or replaced by the lessee to the satisfaction of the said officer, or in lieu of such repair or replacement the lessee shall, if so required by the said officer, pay to the United States money in an amount sufficient to compensate for the loss sustained by the United States by reason of damages to or destruction of Government property.

10. That the United States or its contractors or any of their officers, agents, or employees shall not be responsible, except as otherwise provided in Condition No. 5 hereof, for any loss, expense, damages to property, or injuries to persons, which may arise from or be incident to the use and occupation of the said premises, or for damages to the property of the lessee, or for injuries to the person of the lessee, or for damages to the property or injuries to the person of the lessee's officers, agents, servants, or employees, or others who may be on said premises at their invitation or the invitation of any one of them, arising from activities of the United States or its contractors, and the lessee shall hold the United States and its contractors, and any of their officers, agents, or employees, harmless from any and all such claims.

11. That this lease may be terminated by the lessee at any time by giving at least ten (10) days' notice thereof, in writing, to the said officer; provided that in case of such termination no refund by the United States of any rental theretofore paid shall be made and payment in full of all rentals theretofore due or becoming due during the period of notice will be required; provided further that in the event the effective date of termination occurs after the normal crop season, as determined by the said officer, any rental unpaid for the balance of the annual rental term (or for the balance of the term if the lease be for less than one year) under the terms of this lease shall be due and payable on or before the date of such termination.

12. That for such period as the lessee is in possession of the leased property pursuant to the provisions and conditions of this lease the lessee shall procure and maintain at its cost a standard fire and extended coverage insurance policy or policies on the leased property to the full insurable value thereof. The lessee shall procure such insurance from any responsible company or companies. The policy or policies evidencing such insurance shall provide that in the event of loss thereunder the proceeds of the policy or policies, at the election of the Government shall be payable to the lessee to be used solely for the repair, restoration or replacement of the property damaged or destroyed, any balance of the proceeds not required for the repair, restoration or replacement of the property damaged or destroyed to be paid to the Government, and that in the event the Government does not elect by notice in writing to the insurer within 60 days after the damage or destruction occurs to have the proceeds paid to the lessee for the purposes hereinabove set forth, then such proceeds shall be paid to the Government, provided, however, that the insurer, after payment of any proceeds to the lessee in accordance with the provisions of the policy or policies shall have no obligation or liability with respect to the use or disposition of the proceeds by the lessee. Nothing herein contained shall be construed as an obligation upon the Government to repair, restore or replace the leased property, or any part thereof.

13. (a) That, except as otherwise provided in this lease, any dispute concerning a question of fact arising under this lease which is not disposed of by agreement shall be decided by the

said officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the lessee. The decision of the said officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the lessee mails or otherwise furnishes to the said officer a written appeal addressed to the Secretary of the Army. The decision of the Secretary or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this condition, the lessee shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the lessee shall proceed diligently with the performance of the contract and in accordance with the said officer's decision.

(b) This Condition does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above: Provided, that nothing in this Condition shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

14. That the lessee shall pay to the proper authority, when and as the same becomes due and payable, all taxes, assessments, and similar charges which, at any time during the term of this lease, may be taxed, assessed or imposed upon the Government or upon the lessee with respect to or upon the leased premises. In the event any taxes, assessments, or similar charges are imposed with the consent of Congress upon property owned by the Government and included in this lease (as opposed to the leasehold interest of the lessee therein), this lease shall be renegotiated so as to accomplish an equitable reduction in the rental provided above, which shall not be greater than the difference between the amount of such taxes, assessments or similar charges and the amount of any taxes, assessments or similar charges which were imposed upon such lessee with respect to his leasehold interest in the premises prior to the granting of such consent by the Congress; provided that in the event that the parties hereto are unable to agree within 90 days from the date of the imposition of such taxes, assessments, or similar charges, on a rental which in the opinion of the said officer constitutes a reasonable return to the Government on the leased property, then, in such event, the said officer shall have the right to determine the amount of the rental, which determination shall be binding on the lessee subject to appeal in accordance with Condition No. 13 of this lease.

15. That, in addition to the land-use regulations referred to in Condition No. 4, the use and occupation of the premises leased hereby shall be subject to the general supervision and approval of the officer having immediate jurisdiction over the property and to such rules and regulations regarding ingress, egress, safety, sanitation and security as may be prescribed by him from time to time.

16. That the lessee shall pay the cost, as determined by the officer having immediate jurisdiction over the property, of producing and/or supplying any utilities and other services furnished by the Government or through Government-owned facilities for the use of the lessee, including the lessee's proportionate share of the cost of operation and maintenance of the Government-owned facilities by which such utilities or services are produced or supplied. The Government shall be under no obligation to furnish utilities or services. Payment shall be made in the manner prescribed by the said commanding officer upon bills rendered monthly.

17. That no Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this lease or to any benefit to arise therefrom. Nothing, however, herein contained shall be construed to extend to any incorporated company, if the lease be for the general benefit of such corporation or company.

18. That, on or before the date of expiration of this lease or its termination by the lessee, the lessee shall at its cost vacate the leased property, remove the property of the lessee therefrom, and restore the leased property to as good order and condition as that existing upon the

date of commencement of the term of this lease, less ordinary wear and tear and damage to the leased property covered by insurance and for which the Government shall receive or has received insurance funds in lieu of having the damaged property repaired, replaced, or restored. If, however, this lease is revoked, the lessee shall vacate the leased property, remove the property of the lessee therefrom, and restore the leased property to the condition aforesaid within such time as the Secretary of the Army may designate, except as otherwise provided in Condition 5 hereof. In either event, and except as otherwise provided in Condition 5 hereof, if the lessee shall fail or neglect to remove the property of the lessee and so restore the leased property, then, at the option of the Secretary of the Army, the property of the lessee shall either become the property of the United States without compensation therefor, or the Secretary of the Army may cause it to be removed and the leased property to be so restored at the expense of the lessee, and no claim for damages against the United States or its officers or agents shall be created by or made on account of such removal and restoration work.

18. (ALTERNATE.) That, on or before the date of expiration of this lease, or its termination by the lessee, the lessee shall at the lessee's cost vacate the leased property, remove the property of the lessee therefrom, and restore the premises to as good order and condition as that existing upon the date of commencement of the term of this lease, damages beyond the control of the lessee and due to fair wear and tear excepted. If, however, this lease is revoked, the lessee shall vacate the leased property, remove the property of the lessee therefrom, and restore the leased property to the condition aforesaid within such time as the Secretary of the Army may designate except as otherwise provided in Condition No. 5 hereof. In either event, and except as otherwise provided in Condition No. 5 hereof, if the lessee shall fail or neglect to remove the property of the lessee and so restore the leased property, then, at the option of the Secretary of the Army, the property of the lessee shall either become the property of the United States without compensation therefor, or the Secretary of the Army may cause it to be removed and the leased property so to be restored at the expense of the lessee, and no claim for damages against the United States or its officers or agents shall be created by or made on account of such removal and restoration work.

19. That if more than one lessee is named in this lease the obligation of said lessees herein contained shall be joint and several obligations.

20. That, except as otherwise specifically provided, any reference herein to "Division Engineer", "District Engineer" or "said officer" shall include his duly appointed successor and his authorized representatives.

21. That all notices to be given pursuant to this lease shall be addressed, if to the lessee, to
if to the Government, to the

or as may from time to time be directed by the parties. Notice shall be deemed to have been duly given if and when inclosed in a properly sealed envelope or wrapper, addressed as aforesaid and deposited postage prepaid (or, if mailed by the Government, deposited under its franking privilege) in a post office or branch post office regularly maintained by the United States Government.

22. The lessee warrants that no person or selling agency has been employed or retained to solicit or secure this lease upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the lessee for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this lease without liability or in its discretion to require the lessee to pay, in addition to the lease rental or consideration, the full amount of such commission, percentage, brokerage, or contingent fee.

Before the execution of this lease, conditions were deleted, revised and added in the following manner:

This lease is not subject to Title 10, United States Code, Section 2662.

IN WITNESS WHEREOF I have hereunto set my hand by authority of the Secretary of the Army this day of , 19

THIS LEASE is also executed by the lessee this day of , 19

-----[SEAL]

(Post-Office Address)

Signed and sealed in the presence of:

UNITED STATES DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE

This permit consists

of _____ pages

SPECIAL USE PERMIT

PERMIT NO.	EXPIRES
PREVIOUS PERMIT NO.	

(Area)

_____, of _____ is hereby authorized during the period from _____, 19_____, to _____, 19_____, to use the following-described land in the above-named area:

for the purpose of

subject to the conditions on the reverse hereof and attached pages and to the payment to the Government of the United States of the sum of _____ Dollars (\$_____), in advance _____ (Monthly, semiannually, etc.), or as follows: _____

payment to be made to the Superintendent by Express or Postal Money Order, Certified Check, or Draft payable to the National Park Service, or Cash.

issued at _____, this _____ day of _____, 19_____
(City)

Superintendent.

The undersigned hereby accepts this permit subject to the terms, covenants, obligations, and reservations, expressed or implied, therein.

TWO WITNESSES TO SIGNATURES

*** PERMITTEE (Signature)**

NAME

NAME

ADDRESS

ADDRESS

NAME

NAME

ADDRESS

ADDRESS

APPROVED: (If approval is required by higher authority)

NAME

TITLE

DATE

*Sign name or names as written in body of permit; for copartnership, permittees should sign as "members of firm"; for corporation, the officer authorized to execute contracts, etc., should sign, with title, the sufficiency of such signature being attested by the Secretary, with corporate seal, in lieu of witnesses.

Distribution—Field Finance Office.

CONDITIONS OF THIS PERMIT

1. **Regulations.**—The permittee shall exercise this privilege subject to the supervision of the Superintendent, and shall comply with the regulations of the Secretary of the Interior, or other authorized officer of the Government, governing the area.

2. **Definition.**—The term "Director, National Park Service" as used herein shall include the appropriate Regional Director or Superintendent as the representative of the Director.

3. **Rights of the Director.**—Use by the permittee of the land covered hereby is subject to the right of the Director, National Park Service, to establish trails, roads, and other improvements and betterments over, upon, or through said premises, and further to the use by travelers and others of such roads and trails as well as of those already existing. If it is necessary to exercise such right, every effort will be made by the National Park Service to refrain from unduly interfering or preventing use of the land by the permittee for the purpose intended under this permit.

4. **Nondiscrimination.**—See attachment A.

5. **Damages.**—The permittee shall pay the United States for any damage resulting from this use which would not reasonably be inherent in the use which the permittee is authorized to make of the land described in this permit.

6. **Construction.**—No building or other structure shall be erected under this permit except upon prior approval of plans and specifications by the Director, National Park Service, and the premises and all appurtenances thereto shall be kept in a safe, sanitary, and sightly condition.

7. **Removal of structures and improvements.**—Upon the expiration of this permit by limitation of time or its termination for any reason prior to its expiration date, the permittee, if all charges due the Government hereunder have been paid, shall remove within such reasonable period as is determined by the Superintendent, but not to exceed 90 days unless otherwise stipulated in this permit, all structures and improvements placed on the premises by him, and shall restore the site to its former condition under the direction of the Superintendent. If the permittee fails to remove all such structures and improvements within the aforesaid period, they shall become the property of the

United States, but that will not relieve the permittee of liability for the cost of their removal and the restoration of the site.

8. **Water rights.**—The United States reserves the right to perfect title to all rights for water which may be developed or used in connection with this permit and shall furnish water to the permittee, when available, at reasonable rates to be approved by the Director, National Park Service. Should such water service be unavailable or inadequate, the permittee may, with prior approval of the Director, provide the same at his own expense, subject to such special requirements as may be prescribed.

9. **Disposal of refuse.**—The permittee shall dispose of brush and other refuse as required by the Superintendent.

10. **Timber cutting.**—No timber may be cut or destroyed without first obtaining a permit therefor from the Director, National Park Service.

11. **Fire prevention and suppression.**—The permittee and his employees shall take all reasonable precautions to prevent forest, brush, grass, and structural fires and shall assist the Superintendent in extinguishing such fires in the vicinity of any tract which may be used hereunder.

12. **Soil erosion.**—The permittee shall take adequate measures, as directed and approved by the Superintendent, to restrict and prevent soil erosion on the lands covered hereby and shall so utilize such lands as not to contribute to erosion on adjoining lands.

13. **Benefit.**—Neither Members of, nor Delegates to Congress, or Resident Commissioners shall be admitted to any share or part of this permit or derive, either directly or indirectly, any pecuniary benefit to arise therefrom: *Provided, however,* That nothing herein contained shall be construed to extend to any incorporated company, if the permit be for the benefit of such corporation.

14. **Assignment.**—This permit may not be transferred or assigned without the consent of the Director, National Park Service, in writing.

15. **Revocation.**—This permit may be terminated upon breach of any of the conditions herein or at the discretion of the Director, National Park Service.

SPECIAL USE PERMIT

Act of June 4, 1897, or February 15, 1901
This permit is revocable and nontransferable
(Ref. FSM 2718)

a. Record no. (1-2)	b. Region (3-4)	c. Forest (5-6)
70 --	--	--
d. District (7-8)	e. Use number (9-12)	f. Kind of use (13-15)
--	----	---
g. State (16-17)	h. County (18-20)	k. Card no. (21)
--	---	1 -

Permission is hereby granted to _____
of _____,
hereinafter called the permittee, to use subject to the conditions set out below, the following described lands
or improvements:

This permit covers _____ acres and/or _____ miles and is issued for the purpose of:

1. Construction or occupancy and use under this permit shall begin within _____ months, and construction, if any, shall be completed within _____ months, from the date of the permit. This use shall be actually exercised at least _____ days each year, unless otherwise authorized in writing.

2. In consideration for this use, the permittee shall pay to the Forest Service, U.S. Department of Agriculture, the sum of _____ Dollars (\$ _____) for the period from _____ 19____, to _____, 19____, and thereafter annually on _____ Dollars (\$ _____):

Provided, however, Charges for this use may be made or readjusted whenever necessary to place the charges on a basis commensurate with the value of use authorized by this permit.

3. This permit is accepted subject to the conditions set forth herein, and to conditions _____ to attached hereto and made a part of this permit.

PERMITTEE	NAME OF PERMITTEE	SIGNATURE OF AUTHORIZED OFFICER	DATE
		TITLE	
ISSUING OFFICER	NAME AND SIGNATURE	TITLE	DATE

4. Development plans; layout plans; construction, reconstruction, or alteration of improvements; or revision of layout or construction plans for this area must be approved in advance and in writing by the forest supervisor. Trees or shrubbery on the permitted area may be removed or destroyed only after the forest officer in charge has approved, and has marked or otherwise designated that which may be removed or destroyed. Timber cut or destroyed will be paid for by the permittee as follows: Merchantable timber: appraised value; young-growth timber below merchantable size at current damage appraisal value; *provide* that the Forest Service reserves the right to dispose of the merchantable timber to others than the permittee at no stumpage cost to the permittee. Trees, shrubs, and other plants may be planted in such manner and in such places about the premises as may be approved by the forest officer in charge.

5. The permittee shall maintain the improvements and premises to standards of repair, orderliness, neatness, sanitation, and safety acceptable to the forest officer in charge.

6. This permit is subject to all valid claims.

7. The permittee, in exercising the privileges granted by this permit, shall comply with the regulations of the Department of Agriculture and all Federal, State, county, and municipal laws, ordinances, or regulations which are applicable to the area or operations covered by this permit.

8. The permittee shall take all reasonable precautions to prevent and suppress forest fires. No material shall be disposed of by burning in open fires during the closed season established by law or regulation without a written permit from the forest officer in charge or his authorized agent.

9. The permittee shall exercise diligence in protecting from damage the land and property of the United States covered by and used in connection with this permit, and shall pay the United States for any damage resulting from negligence or from the violation of the terms of this permit or of any law or regulation applicable to the national forests by the permittee, or by any agents or employees of the permittee acting within the scope of their agency or employment.

10. The permittee shall fully repair all damage, other than ordinary wear and tear, to national forest roads and trails caused by the permittee in the exercise of the privilege granted by this permit.

11. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this agreement or to any benefit that may arise herefrom unless it is made with a corporation for its general benefit.

12. Upon abandonment, termination, revocation, or cancellation of this permit, the permittee shall remove within a reasonable time all structures and improvements except those owned by the United States, and shall restore the site, unless otherwise agreed upon in writing or in this permit. If the permittee fails to remove all such structures or improvements within a reasonable period, they shall become the property of the United States, but that will not relieve the permittee of liability for the cost of their removal and restoration of the site.

13. This permit is not transferable. If the permittee through voluntary sale or transfer, or through enforcement of contract, foreclosure, tax sale, or other valid legal proceeding shall cease to be the owner of the physical improvements other than those owned by the United States situated on the land described in this permit and is unable to furnish adequate proof of ability to redeem or otherwise reestablish title to said improvements, this permit shall be subject to cancellation. But if the person to whom title to said improvements shall have been transferred in either manner provided ~~as~~ qualified as a permittee and is willing that his future occupancy of the premises shall be subject to such new conditions and stipulations as existing or prospective circumstances may warrant, his continued occupancy of the premises may be authorized by permit to him if, in the opinion of the issuing officer or his successor, issuance of a permit is desirable and in the public interest.

14. In case of change of address, the permittee shall immediately notify the forest supervisor.

15. The temporary use and occupancy of the premises and improvements herein described may be sublet by the permittee to third parties only with the prior written approval of the forest supervisor but the permittee shall continue to be responsible for compliance with all conditions of this permit by persons to whom such premises may be sublet.

16. This permit may be terminated upon breach of any of the conditions herein or at the discretion of the regional forester or the Chief, Forest Service.

17. In the event of any conflict between any of the preceding printed clauses or any provisions thereof and any of the following clauses or any provisions thereof, the following ~~printed~~ clauses will control.

TERM SPECIAL USE PERMIT

*Act of March 4, 1915, as amended July 28, 1956,
or Act of March 30, 1948*

REGION		STATE	NAME OF PERMITTEE	KIND OF USE
			DATE OF PERMIT	FILE CODE
			FOREST	RANGER DISTRICT

Permission is hereby granted to _____

of _____,
hereinafter called the permittee, to use subject to the conditions set out below, the following described
lands or improvements for the period of _____ years from the date hereof:

This permit covers _____ acres and/or _____ miles and is issued for the purpose of:

The exercise of any of the privileges granted in this permit constitutes acceptance of all the conditions of this permit.

1. In consideration for this use, the permittee shall pay to the Forest Service, U. S. Department of Agriculture, the sum of _____ Dollars (\$) for the period from _____ 19____, to _____, 19____, and thereafter annually on _____ Dollars (\$ _____):

Provided, however, That the charges for this use shall be readjusted as of, and effective on, the beginning of each 5-year period from the due date of the first annual payment in order to place the charges on a basis commensurate with the value of use authorized by this permit.

2. Construction or occupancy and use under this permit shall begin within _____ months, and construction, if any, shall be completed within _____ months, from the date of the permit. This use shall be actually exercised at least _____ days each year, unless otherwise authorized in writing.

3. Development plans; lay-out plans; construction, reconstruction, or alteration of improvements; or revision of lay-out or construction plans for this area must be approved in advance and in writing by the forest supervisor. Trees or shrubbery on the permitted area may be removed or destroyed only after the forest officer in charge has approved, and has marked or otherwise designated that which may be removed or destroyed. Timber cut or destroyed will be paid for by the permittee as follows: Merchantable timber at appraised value; young-growth timber below merchantable size at current damage appraisal value; provided that the Forest Service reserves the right to dispose of the merchantable timber to others than the permittee at no stumpage cost to the permittee. Trees, shrubs, and other plants may be planted in such manner and in such places about the premises as may be approved by the forest officer in charge.

4. The permittee shall maintain the improvements and premises to standards of repair, orderliness, neatness, sanitation, and safety acceptable to the forest officer in charge.

5. This permit is subject to all valid claims.

6. The permittee, in exercising the privileges granted by this permit, shall comply with the regulations of the Department of Agriculture and all Federal, State, county, and municipal laws, ordinances, or regulations which are applicable to the area or operations covered by this permit.

7. The permittee shall take all reasonable precaution to prevent and suppress forest fires. No material shall be disposed of by burning in open fires during the closed season established by law or regulation without a written permit from the forest officer in charge or his authorized agent.

8. The permittee shall exercise diligence in protecting from damage the land and property of the United States covered by and used in connection with this permit, and shall pay the United States for any damage resulting from negligence or from the violation of the terms of this permit or of any law or regulation applicable to the national forests by the permittee, or by any agents or employees of the permittee acting within the scope of their agency or employment.

9. The permittee shall fully repair all damage, other than ordinary wear and tear, to national forest roads and trails caused by the permittee in the exercise of the privilege granted by this permit.

10. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this agreement or to any benefit that may arise herefrom unless it is made with a corporation for its general benefit.

11. Except as provided in Clause 16 below, upon abandonment, termination, revocation, or cancellation of this permit, the permittee shall remove within a reasonable time all structures and improvements except those owned by the United States, and shall restore the site, unless otherwise agreed upon in writing or in this permit. If the permittee fails to remove all such structures or improvements within a reasonable period, they shall become the property of the United States, but that will not relieve the permittee of liability for the cost of their removal and the restoration of the site.

12. This permit is not transferable. If the permittee through voluntary sale or transfer, or through enforcement of contract, foreclosure, tax sale, or other valid legal proceeding shall cease to be the owner of the physical improvements other than those owned by the United States situated on the land described in this permit and is unable to furnish adequate proof of ability to redeem or otherwise reestablish title to said improvements, this permit shall be subject to cancellation. But if the person to whom title to said improvements shall have been transferred in either manner above provided is qualified as a permittee, and is willing that his future occupancy of the premises shall be subject to such new conditions and stipulations as existing or prospective circumstances may warrant, his continued occupancy of the premises will be authorized by a permit to him, which may be for the unexpired term of this permit or for such new period as the circumstances justify.

13. In case of change of address, permittee shall immediately notify the forest supervisor.

14. The temporary use and occupancy of the premises and improvements herein described may not be sublet by the permittee to third parties without the prior written approval of the forest supervisor and the permittee shall continue to be responsible for compliance with all conditions of this permit by persons to whom such premises may be sublet.

15. This permit may be terminated upon breach of any of the conditions herein.

16. If during the term of this permit or any extension thereof, the Secretary of Agriculture or any official of the Forest Service acting by or under his authority shall determine that the public interest requires termination of this permit, this permit shall terminate upon thirty days' written notice to the permittee of such determination, and the United States shall have the right thereupon to purchase the permittee's improvements, to remove them, or to require the permittee to remove them, at the option of the United States, and the United States shall be obligated to pay an equitable consideration for the improvements or for removal of the improvements and damages to the improvements resulting from their removal. The amount of the consideration shall be fixed by mutual agreement between the United States and the permittee and shall be accepted by the permittee in full satisfaction of all claims against the United States under this clause: *Provided*, That if mutual agreement is not reached, the Forest Service shall determine the amount and if the permittee is dissatisfied with the amount thus determined to be due him he may appeal the determination in accordance with Regulation A-10 (36 CFR 211.2) and the amount as determined on appeal shall be final and conclusive on the parties hereto; *Provided further*, That upon the payment to the permittee of 75% of the amount fixed by the Forest Service, the right of the United States to remove or require the removal of the improvements shall not be stayed pending final decision on appeal.

17. The permittee agrees that the amount which the United States shall be required to pay for improvements in accordance with Clause 16 shall in no event exceed \$_____, and that this instrument may be introduced in any judicial proceedings for the acquisition of such improvements by the United States as the stipulation of the permittee and the United States with regard to the maximum amount which the United States shall be required to pay for the taking thereof.

18. In the event of any conflict between any of the preceding printed clauses or any provision thereof and any of the following clauses or any provisions thereof, the preceding printed clauses will control.

19 This permit is accepted subject to the conditions set forth above and to conditions _____ to _____ attached hereto and made a part of this permit.

DATE	SIGNATURE OF ISSUING OFFICER	TITLE
DATE	SIGNATURE OF PERMITTEE	

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

----- IRRIGATION PROJECT

LEASE OF LAND FOR AGRICULTURAL OR GRAZING PURPOSES

This Lease, made this day of , 19 , in pursuance of the act of June 17, 1902 (32 Stat., 388), and acts amendatory thereof or supplementary thereto, between the UNITED STATES OF AMERICA, hereinafter styled the United States, represented by

the officer executing this lease, and
hereinafter styled the lessee.

2. **Witnesseth,** that in consideration of the rents and covenants herein specified, it is hereby mutually agreed by the parties hereto as follows:

3. Description of land leased. --Subject to the conditions hereinafter set forth, the United States does hereby lease to the lessee, for purposes, the
(Agricultural or grazing)
following-described premises in the State of , to wit:

containing acres, more or less, with privileges and appurtenances, subject, however, to the exceptions and reservations set out in the next succeeding article.

4. Exceptions and reservations. --There are excepted and reserved from the lease of the premises described in article 3, the following:

- (a) All lands to which other rights have lawfully attached before the date of this lease.
- (b) The right to remove from said lands any or all timber, both standing and down.
- (c) The right to take from said lands material for the construction of irrigation works, and to construct, operate, and maintain such works thereon.
- (d) The right to prospect and carry on developments for oil, gas, coal, and other minerals, on said lands, under the act of October 2, 1917 (40 Stat., 297), and the act of February 25, 1920 (41 Stat., 437).
- (e) A right-of-way along all section lines, or other practicable routes when locations on section lines are not feasible, freely to give ingress to, passage over, and egress from all of said lands.
- (f) The right of the officers, agents, employees, licensees, and permittees of the United States, at all proper times and places, freely to have ingress to, passage over, and egress from all of said lands, for the purpose of exercising, enforcing, and protecting the rights described in and reserved by this article, or for the purpose of operating and maintaining any Federal project thereon.
- (g)

5. Term of lease. --The lease of the premises described shall be for the period from _____, 19____, to _____, 19____, inclusive, unless sooner terminated as hereinafter provided.

6. Extension of lease term. --The lessee has an option to extend the term of the lease as defined in the preceeding article, for successive additional periods of one year each, but in no event beyond _____ if such lessee shall at the time of the exercise of the option have paid all previous rentals due and if such option is exercised in the following manner and by the observance of the following conditions:

- (a) Such option must be first exercised not later than 30 days prior to the termination of the lease as defined in article 5, and if extended not later than 30 days prior to the termination of each extension thereof.
- (b) Such option must be exercised by payment in advance to the United States at least 30 days prior to the termination of the lease of the rental for the period for which the term is by exercise of such option to be extended, accompanied by a notice that the lessee desires to exercise such option. Such notice and such payment must be actually received by the United States at least 30 days prior to such lease termination.

7. Rental charges. --The lessee shall pay to the United States rental charges for the premises described as follows: The sum of \$ _____ on the date hereof for the period ending _____, 19____, and the sum of \$ _____ on account of each renewal or extension of this lease.

8. Repairs. --The lessee shall, at his own cost and expense, keep in a state of good repair such fences and ditches as may be located on the leased premises.

9. Miscellaneous conditions. --In the use of the leased premises the lessee shall faithfully observe the following conditions, and each of them:

- (a) Not more than _____ animal unit months of grazing shall be permitted during the period _____
- (b) No unlawful business shall be carried on.
- (c) No fence, with or without gates, shall be constructed upon or across the right-of-way of any canal or lateral operated or controlled by the United States.
- (d) No waste shall be committed.
- (e) The lessee shall release and relinquish any and all claims which he at any time may have or claim to have against the United States, its officers, agents and employees on account of injury to or loss of animals pastured or loss of or damage to growing crops pursuant to the lease which may be caused or claimed in whole or in part by the existence or condition of the reservoir or other irrigation and flood control works or by any cause whatsoever.
- (f)

10. Transfer of lease. --Neither this lease nor any interest therein shall be transferred by the lessee, without the written consent of the United States made by the officer executing this lease on behalf of the Government, and until payment has been made to the United States of the sum of ten dollars (\$10), to cover the expense of approving such transfer.

11. Termination of lease. --This lease shall terminate and all rights of the lessee hereunder shall cease, and the lessee shall quietly and peaceably deliver to the United States possession of the leased premises in like condition as when taken, reasonable wear and damage by the elements excepted:

- (a) At the expiration of the term as provided by articles 5 and 6; or,
- (b) Without notice, upon default in payment to the United States or any installment of rental charges as provided by article 7; or
- (c) On _____, of any year, upon written notice to the lessee, served 30 days in advance thereof; or,
- (d) After failure of the lessee to observe any of the conditions of articles 9 or 10, and on the tenth day following service of written notice on the lessee of termination because of failure to observe such condition.

The notices provided by this article shall be served by registered mail addressed to the respective post office addresses given at the foot of this lease, and the mailing of any such notice properly enclosed, addressed, stamped, and registered, shall be considered service. If the termination under article 11 (c) or article 11 (d) should be effective at a date prior to the date of the termination of the then current lease or extension, for which prepayment of rental shall have been made, and appropriate refund (as conclusively determined by the Secretary of the Interior) of part of the rental for such then current lease or extension will be made.

12. Covenant against Contingent Fees. --Lessee warrants that no person or agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial agencies maintained by the lessee for the purpose of securing business. For breach or violation of this warranty, the Government shall have the right to annul this contract without liability or in its discretion to require the licensee to pay, in addition to the contract price or consideration, the full amount of such commission, percentage, brokerage, or contingent fee.

13. Nondiscrimination Clause. --The following provisions governing performance of work under Government contracts, as set out in Section 301 of Executive Order 10925, dated March 6, 1961 (26 F. R. 1977), shall be applicable to this lease and for this purpose, the term "contract" shall be deemed to refer to this lease and the term "contractor" shall be deemed to refer to the lessee.

"In connection with the performance of work under this contract, the contractor agrees as follows:

'(1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

'(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.

'(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the said labor union or workers' representative of the contractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

'(4) The contractor will comply with all provisions of Executive Order No. 10925 of March 6, 1961, and of the rules, regulations, and relevant orders of the President's Committee on Equal Employment Opportunity created thereby.

'(5) The contractor will furnish all information and reports required by Executive Order No. 10925 of March 6, 1961, and by the rules, regulations, and orders of the said Committee, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Committee for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

'(6) In the event of the contractor's non-compliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be cancelled in whole or in part and the contractor may be declared ineligible for further government contracts in accordance with procedures authorized in Executive Order No. 10925 of March 6, 1961, and such other sanctions may be imposed and remedies invoked as provided in the said Executive order or by rule, regulation, or order of the President's Committee on Equal Employment Opportunity, or as otherwise provided by law.

'(7) The contractor will include the provisions of the foregoing paragraphs (1) through (6) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the President's Committee on Equal Employment Opportunity issued pursuant to section 303 of Executive Order No. 10925 of March 6, 1961, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions, including sanctions for non-compliance. Provided, however, that in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

14. Officials not to benefit. --No member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit to arise therefrom. Nothing, however, herein contained shall be construed to extend to any incorporated company if the contract be for the general benefit of such corporation or company.

15. Successors in interest obligated. --The provisions of this lease shall apply to and bind the assigns of the United States, and the heirs, executors, administrators, and assigns of the lessee.

In Witness Whereof the parties have hereunto subscribed their names as of the date first above written.

UNITED STATES OF AMERICA

By _____
Bureau of Reclamation

P. O. Address _____

Lessee.

P. O. Address _____

INSTRUCTIONS

1. Before having lease executed, field officials should see that pertinent Reclamation Instructions have been fully complied with, and that all necessary changes or additions as may be required by these Instructions are inserted therein.
2. Any necessary additional reservation should be made in article 4, under paragraph (g) and any necessary additional condition should be set out in article 9, under paragraph (f).
3. The post office address of the lessee must appear in the lease, all dates should be plainly given and blanks carefully filled and all particulars and conditions stated as fully and as clearly as practicable.
4. Erasures and interlineations or other irregularities must be explained over the signatures of the parties to this lease. A general statement that "erasures and interlineations were made before execution," is not sufficient.
5. Leases should be executed in duplicate.
6. A lease with a firm should describe the lessee in the preamble as, for instance, "Doe & Roe, a partnership, consisting of John Doe and Richard Roe, copartners," the names of all members of the firm being inserted. The lease should be signed in the firm name by a member thereof, who should also affix his title of "Copartner."
7. A lease with a corporation should describe the lessee in the preamble as, for instance, "Doe Cattle Company, a corporation duly organized under the laws of the State of Colorado." The lease should be signed in the corporate name by an appropriate officer thereof, who should affix his official designation, together with the corporate seal. A certificate under the corporate seal that the officer signing the lease is authorized to do so should accompany the lease. If the corporation has no seal the certificate should state that fact. Such certificate of authority once filed will not be required in a subsequent lease if it bears a reference to the case in which it was furnished, with statement that it is still effective.
8. In the execution of this lease the names of the parties should be signed in ink in the usual manner and as written in the body of the instrument.

GPO 880341

Serial No. _____

Date _____

UNITED STATES
DEPARTMENT OF THE INTERIOR
LOWER COLORADO RIVER LAND USE OFFICE

Application and Permit for Use of Land in Lower Colorado River Area

APPLICATION

1. The undersigned applicant hereby applies for a permit for the use of that portion of the following described lands in the County of _____, State of _____: _____ Base and Meridian, Township _____, Range _____, Section _____, further described on Attachment No. 1 hereto attached, and by reference made a part hereof; presently occupied or used by applicant and agrees that approval of this application and applicant's use and occupancy of said lands hereunder shall at all times be subject to the terms, conditions and limitations set out in this application and permit.

2. Applicant hereby acknowledges that the title and right to possession of said lands is and has at all times during applicant's past occupancy and/or use thereof been vested in the United States of America, hereinafter referred to as United States. Applicant abandons and relinquishes any and all right, title and interest to any mining claims located thereon.

3. Applicant agrees not to apply for or accept acreage reserve or other payments from the United States Department of Agriculture or any similar or other Federal subsidy payment in connection with said lands, except for Upland cotton subsidies, unless the written approval of the officer issuing the permit herein applied for is first obtained.

4. The purpose for which applicant has heretofore used said lands and to which applicant's future use thereof will be limited is as follows:

If, agricultural, the type, capacity, and horsepower of applicant's pumping facilities are as follows:

5. This application is made for an initial term commencing on January 1, 1969, and ending on December 31, 1969, and continuing thereafter for successive periods of one year each; provided, however, that the permit herein applied for may be terminated on December 31st of any year during its term or any extension thereof by written notice served by the applicant

upon the United States at least sixty (60) days in advance thereof, and provided further that said permit may be terminated at the end of the initial term or at the end of any such successive one-year period by written notice served by the United States upon the applicant at least ninety (90) days in advance thereof.

6. Applicant agrees, if this application is approved, to pay to the United States upon approval of the application the amount of _____ Dollars for the use of said lands from January 1, 1969 to and including December 31, 1969. Applicant further agrees to pay for the use of said lands for each calendar year thereafter during which this permit remains in force such further amounts as may be determined by the issuing officer. It is understood that, unless written notice is given to the applicant by the issuing officer at least ninety (90) days before the beginning of any calendar year that a different amount has been determined by the issuing officer for that year, the amount payable for each such calendar year shall be equal to the amount payable for the preceding calendar year. The above-mentioned charges for each calendar year shall be payable on January 1st of each such year in advance. All payments under this paragraph shall be made payable to the United States Department of the Interior at the Lower Colorado River Land Use Office, Box 1648, 2450 24th Avenue, Yuma, Arizona 85364.

7. (a) Applicant hereby releases the United States, its successors and assigns, and its officers, agents and employees from all claims for damages of every description or kind resulting from any operations heretofore or hereafter conducted on said lands and agrees to save and hold each of them harmless from liability to any third party for damages of every description or kind resulting from such operations. Applicant further releases the United States, its successors and assigns, and its officers, agents and employees from all claims for damages of every description or kind attributable in whole or in part to the natural action of the Colorado River or any tributary thereof or to any operations or activities of the United States in controlling or regulating said river.

(b) The applicant warrants that no person or selling agency has been employed or retained to solicit or secure this permit upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the applicant for the purpose of securing business. For breach or violation of this warranty, the United States shall have the right to annul this permit without liability or in its discretion to require the applicant to pay, in addition to the consideration, the full amount of such commission, percentage, brokerage or contingent fee.

8. (a) Applicant understands and agrees that neither this application nor the granting of the permit herein shall be deemed to confer upon applicant

any title to or property interest in any of the lands within the permit area, nor to confer upon applicant any equity therein or any right to renew or extend the permit beyond the period provided for in paragraph 5 hereof.

(b) Applicant understands that the permit herein shall constitute a privilege for the use of only such lands as were used or occupied by applicant prior to April 20, 1961, for the purpose hereinabove specified and that the permit shall not be assigned without the written approval of the officer issuing the permit.

Witnesses:

Applicant

Applicant

Mailing Address of Applicant

Title 18 USC, Sec. 1001 makes it a crime for any person knowingly and willfully to make to any Department or agency of the United States any false, fictitious, or fraudulent statements or representations as to any matter within its jurisdiction.

PERMIT

9. Subject to the terms, conditions and limitations set out in the foregoing application and in the following paragraphs, the foregoing application is hereby approved for the term specified in paragraph 5 above, subject to any existing right or right of way in favor of the public or a third party, and the right of the United States to install and maintain revetment works, including but not limited to the right of access for that purpose over and across the permit area, and subject further to the right of the United States to terminate the within permit with respect to any or all of the land described in paragraph 1 upon not less than ninety (90) days' written notice given to the applicant by the officer issuing the permit certifying that the land specified in such notice is needed for use by the Bureau of Reclamation.

10. Applicant shall not be entitled to the assistance of the United States in perfecting or maintaining his possession against third parties.

11. Crops as well as any structures and other improvements presently situate within the permit area, exclusive of those constructed or installed by the United States, may insofar as the United States is concerned, be removed during the term of this permit and any extension thereof. In the absence of advance written approval of the officer issuing this permit, applicant shall not hereafter clear or level, or install or construct any structures or other improvements within the permit area, except such improvements and such clearing and levelling as are necessary to maintain the land in its present condition, as determined by the officer issuing the permit.

Any structures, improvements or other property of any character not removed from the permit area on or before the end of the permit term as it may be extended shall be subject to disposition by the United States, free from any responsibility to applicant or any third party in connection therewith.

Neither the construction or installation of structures or other improvements nor any operations or work done during the term of this permit shall enlarge or otherwise modify the nature or extent of applicant's rights hereunder. Any such structures or other improvements shall be subject to the same provisions as those situate within the permit area at the commencement of the permit term.

12. (a) In the event that the applicant diverts or pumps Colorado River water in connection with the enjoyment of the permit area such diversion or pumping by applicant during the term of this permit or any extension thereof shall be for essential beneficial use only and shall cease upon and as provided by 30 days' written notice to applicant from the Secretary of the Interior or the officer issuing the permit that Colorado River water is no longer available for use within the permit area. In the event that such notice is given, applicant may terminate this permit.

(b) If the applicant diverts or pumps Colorado River water for agricultural use, applicant shall give advance notice of the daily water requirements for each period of seven (7) consecutive days beginning Monday of each week. Such notice shall be given not later than the Wednesday preceding such Monday to the official of the Bureau of Reclamation designated for that purpose by the officer issuing the permit. Quantities specified in such notice may be modified with the approval of the Bureau of Reclamation. Such notice shall be in the form prescribed by the Bureau of Reclamation, and applicant shall keep such records of water use as may be required by the Bureau of Reclamation.

13. Applicant shall not cause or permit any waste within the permit area and shall not use, occupy or claim any other federally owned lands except as authorized by law.

14. The United States, its officers, agents, employees, licensees and permittees shall at all reasonable times, have free ingress to, passage over and egress from all of the permit area. The applicant shall permit members of the public to have reasonable access to the Colorado River across the permit area without charge.

15. Issuance of the within permit does not authorize any occupancy or any acts or omissions contrary to applicable state, county, or local laws or ordinances.

16. The within permit shall terminate and all rights of the applicant hereunder shall cease:

(a) Upon the termination of the term or extended term hereof in the manner specified in paragraph 5 hereof, subject to any modification made in paragraph 9 hereof,

(b) After failure of the applicant to perform or comply with any of the provisions of this application and permit, and on the 30th day following the giving of written notice to applicant of termination because of failure to perform such provision; provided that, except as to a breach of any of the provisions of paragraph 12, this subparagraph (b) shall not apply to the first failure of an applicant to perform or comply in any one calendar year until such applicant has been given written demand by the United States specifying the performance or compliance required and applicant has failed for 15 days following the giving of such written demand to so perform and comply.

17. Any notice required or authorized to be given to applicant shall be deemed properly given if delivered or mailed, postage prepaid, to applicant's mailing address as stated in the application; and in the case of the United States, to the Lower Colorado River Land Use Office, Box 1648,

Yuma, Arizona, or such other address as may later be designated by notice given in writing to the applicant.

18. As used herein the term "officer issuing the permit" shall mean the officer issuing the permit, his successor, or any person duly authorized by the Secretary of the Interior to issue a permit for use of land in the Lower Colorado River Area.

19. In the event that this permit or any portion thereof is terminated before the end of its term or the end of any extended term under the provisions of either paragraph 9, paragraph 12, or paragraph 16 hereof, any prepaid rent will be refunded on a pro rata basis. No other payments made to the United States under the within permit or application herein shall be refundable.

20. The above application is hereby made a part of this permit with the same force and effect as if it had been expressly set forth herein.

21. Recitation of the right to terminate this permit in the event of breach shall not be construed as a waiver by the United States of any rights to secure compliance with the terms of the application and permit.

22. The applicant will comply fully with all applicable Federal laws, orders and regulations, and the laws of the State of California, all as administered by appropriate authorities, concerning the pollution of streams, reservoirs, groundwater or water courses with respect to pollution of any kind or the discharge of refuse, garbage, sewage effluent, oil, mineral salts or other pollutants. Any contract applicant may enter into with a third party will contain a similar water pollution control article.

23. This permit is issued upon the express condition and with the express covenant that all rights of the applicant based thereon shall be subject to and controlled by the Colorado River Compact, approved by the Act of December 21, 1928 (45 Stat. 1057), and other applicable laws and court decrees.

24. No Member of or Delegate to Congress or Resident Commissioner, and no officer, agent or employee of the Department of the Interior, shall be admitted to any share or part of this permit or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this permit if made with a corporation or company for its general benefit, nor shall it limit the use by the aforementioned persons of accommodations, facilities, services or privileges offered to or enjoyed by the general public.

25. (a) The following provisions, set out in section 202 of Executive Order No. 11246 dated September 24, 1965, shall apply and for this purpose, the term "contract" shall be deemed to refer to this permit and the term

"contractor" shall be deemed to refer to the applicant:

During the performance of this contract, the contractor agrees as follows:

- (1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.
- (2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.
- (3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under section 202 of Executive Order 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.
- (4) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.
- (5) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.
- (6) In the event of the contractor's noncompliance with the non-discrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be canceled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized

in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) The contractor will include the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: Provided, however, That in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

(b) If applicant's operations under this permit involve the furnishing of accommodations, facilities, services or privileges, the following provisions shall apply:

The applicant and his employees shall not discriminate by segregation or otherwise against any person because of race, creed, color, or national origin by refusing to furnish such person any accommodation, facility, service, or privilege offered to or enjoyed by the general public. Nor shall the applicant or his employees publicize any accommodations, facilities, services, or privileges offered within the permit area in any manner that would directly or inferentially reflect upon or question the acceptability of the patronage of any person because of race, creed, color, or national origin. The applicant shall include and require compliance with a provision similar to the one contained in this subparagraph in any subcontract made with respect to any operations under this permit.

26. Claims of the United States arising out of this permit shall have priority over all others, secured or unsecured.

27. The waiver of a breach of any of the provisions of this permit shall not be deemed to be a waiver of any provision hereof, or of any other or subsequent breach of any provision hereof.

28. Nothing contained in this permit shall be construed as in any manner abridging, limiting or depriving the United States of any means of enforcing any remedy either at law or in equity for the breach of any of the provisions hereof or of the above application which it would otherwise have.

29. If this permit authorizes agricultural use, applicant shall follow accepted practices of good husbandry and shall comply with soil conservation requirements of the United States.

30. Utilization of the permit area is prohibited for the production of any or all of the following price-supported crops which have been determined by the Secretary of Agriculture to be in surplus supply and which have been determined by the officer issuing this permit to be nonessential to the economy of the applicant or to the economy of the area in which the permit area is located. This list may be amended or supplemented at any time during the term of the permit or any extension thereof by written notice to the applicant:

31. The maximum irrigable acreage within the permit area for which Colorado River water may during the term of this permit or any extension thereof be diverted or pumped or both by the applicant shall be 160 acres for each applicant who is a single person and 320 acres where the application is made by a man and his wife.

32. Special provisions:

_____, 1968

UNITED STATES OF AMERICA

By _____
Issuing Officer

APPENDIX D

LEGISLATIVE, ADMINISTRATIVE AND JUDICIAL MATERIALS DEALING WITH THE DISPOSAL OF FEDERAL LANDS

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ITEM 1
EXECUTIVE ORDER NO. 6910

WITHDRAWAL FOR CLASSIFICATION OF ALL PUBLIC LAND IN CERTAIN
STATES

WHEREAS, the act of June 28, 1934 (ch. 865, 48 Stat. 1269), provides, among other things, for the prevention of injury to the public grazing lands by overgrazing and soil deterioration; provides for the orderly use, improvement and development of such lands; and provides for the stabilization of the livestock industry dependent upon the public range; and

WHEREAS, in furtherance of its purposes, said act provides for the creation of grazing districts to include an aggregate area of not more than eighty million acres of vacant, unreserved and unappropriated lands from any part of the public domain of the United States; provides for the exchange of State owned and privately owned lands for unreserved, surveyed public lands of the United States; provides for the sale of isolated or disconnected tracts of the public domain; and provides for the leasing for grazing purposes of isolated or disconnected tracts of vacant, unreserved and unappropriated lands of the public domain; and

WHEREAS, said act provides that the President of the United States may order that unappropriated public lands be placed under national-forest administration if, in his opinion, the land be best adapted thereto; and

WHEREAS, said act provides for the use of public land for the conservation or propagation of wild life; and

WHEREAS, I find and declare that it is necessary to classify all of the vacant, unreserved and unappropriated lands of the public domain within certain States for the purpose of effective administration of the provisions of said act;

NOW, THEREFORE, by virtue of and pursuant to the authority vested in me by the act of June 25, 1910 (ch. 421, 36 Stat. 847), as amended by the act of August 24, 1912 (ch. 369, 37 Stat. 497), and subject to the conditions therein expressed, it is ordered that all of the vacant, unreserved and unappropriated public land in the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah and Wyoming be, and it hereby is, temporarily withdrawn from settlement, location, sale or entry, and reserved for classification, and pending determination of the most useful purpose to which such land may be put in consideration of the provisions of said act of June 28, 1934, and for conservation and development of natural resources.

The withdrawal hereby effected is subject to existing valid rights.

This order shall continue in full force and effect unless and until revoked by the President or by act of Congress.

/s/ FRANKLIN D. ROOSEVELT

10 a.m. E.S.T.

November 26, 1934.

ITEM 2
EXECUTIVE ORDER NO. 6964

WITHDRAWAL FOR CLASSIFICATION OF ALL PUBLIC LAND IN CERTAIN
STATES

WHEREAS title II of the National Industrial Recovery Act, of June 16, 1933 (ch. 90, 48 Stat. 195), provides among other things for the preparation of a comprehensive program of public works which shall include among other matters the conservation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion, and flood control; and

WHEREAS in furtherance of the said act the Special Board for Public Works appointed by Executive Order No. 6174, of June 16, 1933, has by its resolution of July 18, 1934, included in the comprehensive program of public works contemplated by title II of the National Industrial Recovery Act certain projects known as "The Land Program, Federal Emergency Relief Administration"; and

WHEREAS the said Land Program contemplates the use of public lands in the States of Alabama, Arkansas, Florida, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, Oklahoma, Washington, and Wisconsin for projects concerning the conservation and development of forests, soil, and other natural resources, the creation of grazing districts, and the establishment of game preserves and bird refuges; and

WHEREAS I find and declare that it is necessary to classify all the unreserved and unappropriated lands of the public domain within the said States for the purpose of the effective administration of the said Land Program:

NOW, THEREFORE, by virtue of and pursuant to the authority vested in me by the act of June 25, 1910 (ch. 421, 36 Stat. 847), as amended by the act of August 24, 1912 (ch. 369, 37 Stat. 497), and subject to the conditions therein expressed and to valid existing rights, it is ordered that all the public lands in the States of Alabama, Arkansas, Florida, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, Oklahoma, Washington, and Wisconsin be, and they are hereby, temporarily withdrawn from settlement, location, sale, or entry, and reserved for classification and pending determination of the most useful purposes to which said lands may be put in furtherance of said Land Program, and for the conservation and development of natural resources.

Public lands within any of the States herein enumerated which are on the date of this order under an existing reservation for a public purpose are exempted from the force and

effect of the provisions of this order so long as such existing reservation remains in force and effect.

This order shall continue in full force and effect unless and until revoked by the President or by an act of Congress.

/s/ FRANKLIN D. ROOSEVELT

The White House.

February 5, 1935.

ITEM 3

TEXT OF CLASSIFICATION AND MULTIPLE USE ACT
OF 1964

PUBLIC LAW 88-607 - Sept. 19, 1964

Public Law 88-607

AN ACT

To authorize and direct that certain lands exclusively administered by the Secretary of the Interior be classified in order to provide for their disposal or interim management under principles of multiple use and to produce a sustained yield of products and services, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
That, consistent with and supplemental to the Taylor Grazing Act of June 28, 1934, as amended (48 Stat. 1269; 43 U.S.C. 315), and pending the implementation of recommendations to be made by the Public Land Law Review Commission--

(a) The Secretary of the Interior shall develop and promulgate regulations containing criteria by which he will determine which of the public lands and other Federal lands, including those situated in the State of Alaska exclusively administered by him through the Bureau of Land Management shall be (a) disposed of because they are (1) required for the orderly growth and development of a community or (2) are chiefly valuable for residential, commercial, agricultural (exclusive of lands chiefly valuable for grazing and raising forage crops), industrial, or public uses or development or (b) retained, at least during this period, in Federal ownership and managed for (1) domestic livestock grazing, (2) fish and wildlife development and utilization, (3) industrial development, (4) mineral production, (5) occupancy, (6) outdoor recreation, (7) timber production, (8) watershed protection, (9) wilderness preservation, or (10) preservation of public values that would be lost if the land passed from Federal ownership. No such regulation shall become effective until the expiration of at least thirty days after the Secretary or his designee has held a public hearing thereon. Before such public hearing is held, a notice of at least thirty days shall have been given through publication in the Federal Register and notification to the President of the Senate and the Speaker of the House of Representatives, both of whom shall receive with the notice a copy of the proposed regulation.

(b) The Secretary of the Interior shall, as soon as possible, review the public lands as defined herein, in the light of the criteria contained in the regulations issued with this section to determine which lands shall be classified as suitable for disposal and which lands he considers to contain such values as to make them more suitable for retention in Federal ownership for interim management under the principles enunciated in this section. In making his determinations the Secretary shall give due consideration to all pertinent factors, including, but not limited to, ecology, priorities of use, and the relative values of the various resources in particular areas.

(1) None of the land subject to this Act shall be given a designation or classification unless such designation or classification is authorized by statute or defined in regulations promulgated by the Secretary of the Interior.

Sec. 2. At least sixty days prior to taking the following action the Secretary of the Interior or his designee shall give such public notice of the proposed action as he deems appropriate, including publication in the Federal Register and in a newspaper having general circulation in the area or areas in the vicinity of the affected land:

(a) Classification for sale or other disposal under any statute of a tract of land in excess of two thousand five hundred and sixty acres.

(b) Classification for management by the Bureau of Land Management of an area in excess of two thousand five hundred and sixty acres when the action will exclude from the area permanently, or for a substantial period of time, one or more uses enumerated in section 1 of this Act.

Sec. 3. The Secretary of the Interior shall develop and administer for multiple use and sustained yield of the several products and services obtainable therefrom those public lands that are determined to be suitable for interim management in accordance with regulations promulgated pursuant to this Act.

Sec. 4. Publication of notice in the Federal Register by the Secretary of the Interior of a proposed classification under this Act shall have the effect of segregating such land from settlement, location, sale, selection, entry, lease, or other formal disposal under the public land laws, including the mining and mineral leasing laws, except to the extent that the proposed classification or subsequent notification thereof specifies that the land shall remain open for one or more of such forms of disposal under the public land laws. The segregative effect of such proposed classification shall continue for a period of two years from the date of publication unless classification has theretofore been completed in accordance with the provisions of this Act and the regulations to be

promulgated hereunder, or unless the Secretary of the Interior shall terminate it sooner. Lands classified for sale or other disposal shall be offered for sale or such other disposal within two years of the date of publication of the proposed classification and if not so offered for sale or other disposal the segregative effect shall cease at the expiration of two years from the date of publication. The proposed classification or proposed sale or other disposal may be continued beyond the two-year period if notice of such proposed continuance, including a statement of necessity for continued segregation, is submitted to the President of the Senate and the Speaker of the House of Representatives and published in the Federal Register not more than ninety days nor less than thirty days prior to the expiration of the two-year period specified herein; and thereupon the segregative effect shall be extended for such additional period as is specified in the notice, not exceeding two years, unless Congress or the Secretary of the Interior terminates the segregation at any earlier date.

Sec. 5. As used in this Act, the following terms shall have the following meanings:

(a) The term "public lands" means any lands (1) withdrawn or reserved by Executive Order Numbered 6910 of November 26, 1934, as amended, or 6964 of February 5, 1935, as amended, or (2) within a grazing district established pursuant to the Act of June 28, 1934 (48 Stat. 1269), as amended, or (3) located in the State of Alaska, which are not otherwise withdrawn or reserved for a Federal use or purpose.

(b) "Multiple use" means the management of the various surface and subsurface resources so that they are utilized in the combination that will best meet the present and future needs of the American people; the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

(c) "Sustained yield of the several products and services" means the achievement and maintenance of a high-level annual or regular periodic output of the various renewable resources of land without impairment of the productivity of the land.

Sec. 6. The purposes of this Act are declared to be supplemental to the purposes for which any of the Federal lands in section 1 of this Act have been designated, acquired

withdrawn, reserved, held, or administered. This Act shall not be construed as a repeal, in whole or in part, of any existing law, including, but not limited to, the mining and mineral leasing laws.

Sec. 7. Nothing herein contained shall be construed as—

(a) Restricting prospecting, locating, developing, mining, entering, leasing, or patenting the mineral resources of the lands to which this Act applies under law applicable thereto pending action inconsistent therewith under this Act.

(b) Restricting the entry and settlement of lands open to entry and settlement under the public land laws pending action inconsistent therewith under this Act.

(c) Restricting the Secretary of the Interior from disposing of lands under applicable statutes after the land has been classified in accordance with this Act.

(d) Affecting the jurisdiction or responsibilities of the several States with respect to the lands referred to herein.

Sec. 8. The authorizations and requirements of this Act shall expire June 30, 1969, except that the segregation prior to June 30, 1969, of any public lands from settlement, location, sale, selection, entry, lease, or other form of disposal under the public land laws shall continue for the period of time allowed by this Act.

Approved September 19, 1964.

ITEM 4

BUREAU OF LAND MANAGEMENT FORM LETTER - HOMESTEADING

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
LAND OFFICE
E-2807 Federal Office Building
2800 Cottage Way
Sacramento, California 95825

This is in response to your recent inquiry about homesteading on public lands.

HOMESTEADING is almost a thing of the past. The homestead law is an agricultural law designed to permit a qualified individual to develop a farm home for himself and his family. The law has been in effect for over a century, and long ago the good agricultural land passed into private ownership. The Director of the Bureau of Land Management recently announced that far less than 1 per cent of the land left in the public domain is suitable for farming. What remains has great value--for public recreation, livestock grazing, forestry, hunting and fishing, mineral development, urban expansion and many other uses--but seldom for farming.

The public lands are mostly either true desert, rocky hillsides or semi-arid range lands often located miles from civilization and devoid of water supply and a day's hike from the nearest road or trail. However, if you know of an area which you think is truly valuable for agriculture, the following basic steps will be helpful.

FIRST, The responsibility for finding the land is yours. It must be vacant and unappropriated land adaptable to agricultural use. You are welcome to use the official land records in your search, but there is no current status map or list of the public lands. The official records are available to the public between the hours of 10 a.m. and 4 p.m., Monday through Friday, except holidays. These records list the appropriations, entries, applications, withdrawals, leases, etc., which affect a particular section. Finding vacant land is a process of elimination. After you have crossed off your map or diagram the land which is not available, anything remaining is public land. You must inspect the land on the ground. You should also check as to the access to the land. There are no provisions under Federal law which provide access across privately-owned lands.

SECOND, You must submit an application on the proper form which

must be accompanied by a Petition for Classification and a \$25 nonrefundable service charge. The lands applied for are examined by Bureau personnel who will determine its highest and best use and how the lands will provide the maximum benefit for the general public. This study is defined as land classification. Only when found to be more suitable for agriculture than any other purpose can the lands be classified for homestead entry.

THIRD, If the lands are favorably classified, your entry will be allowed, and you will be required to establish residence on the land, to the exclusion of a home elsewhere. You and your family must reside on the land at least 7 months of the year for 3 years (allowances are made for military service for a portion of this time). You must also build a suitable dwelling on the lands and cultivate at least 1/8 of the total acreage. Cultivation means preparing the land, planting seeds and tilling for a crop. Orchards and tree farming do not qualify as agriculture under the Homestead Law.

If you have any further questions, please advise.

ITEM 5

FINAL PROOF CHECKLIST*

VOLUME V LANDS

PART 2 DISPOSALS

CHAP. 2.2 HOMESTEADS (SEC. 2289 R.S.)

2.2.39

- .39 The adjudication officer will have the proof together with the appended evidence, if any, examined for completeness and accuracy and for the following:

EXAMINATION
OF PROOF

- A. Whether the entryman has complied with the cultivation requirements of the law, taking into consideration:

CULTIVATION

- (1) Exemptions or credits as an heir or devisee.
- (2) Reduction on account of commutation of the entry.
- (3) Reduction as a result of credit for military service prior to World War II and for certain World War II and Korean conflict service.
- (4) Exemption for certain entries made prior to February 5, 1935.
- (5) Exemption for occurrence of insanity or judicial restraint.
- (6) Credit for cultivation on other entries.
- (7) Authorized reductions on account of the poor character of the land or adverse climatic conditions.
- (8) Exemption for unavoidable misfortune.

*Source: Bureau of Land Management, Department of Interior, Bureau of Land Management Manual, Vol. 5, Part 2, Ch. 2.2 (1955).

2.2.39B

CHAP. 2.2 HOMESTEADS (SEC. 2289 R.S.)

RESIDENCE B. Whether the entryman has complied with the residence requirements of the law, taking into consideration:

- (1) Exemptions or credits as an heir or devisee.
- (2) Credit for military service.
- (3) Authorized leaves of absence.
- (4) Exemption for occurrence of insanity or judicial restraint.
- (5) Reduction on account of commutation of the entry.
- (6) Exemption on account of intermarriage of homesteaders.
- (7) Credit for residence on other entries.
- (8) Reduction on account of adverse climatic conditions.
- (9) Excused absences on account of unavoidable misfortunes.

CITIZENSHIP C. Whether the entryman meets the citizenship requirements of the laws.

ALIENS

- (1) If the entryman has declared his intentions to become a citizen but has not filed for citizenship, the adjudication officer will allow him 30 days to file his application for citizenship, failure to do so being cause for cancellation of the entry.

(a) If he does file such an application the adjudication officer will suspend the proof for the appropriate period after which time he will require the entryman to bring his proof up to date.

EVIDENCE OF
CITIZENSHIP

- (2) Unless he has reason to suspect the evidence, the adjudication officer will accept any statement or evidence made or submitted concerning citizenship, except that naturalized citizens must have a record of naturalization, showing the date, court, and district of naturalization.

(a) If he questions the matter, he will ask the classification officer to investigate it.

CHAP. 2.2 HOMESTEADS (SEC. 2289 R.S.)

2.2.39D

- D. Whether the entryman established residence within the statutory period, taking into consideration any authorized extension of time. ESTABLISHMENT OF RESIDENCE
- E. Whether the entryman has a habitable house upon the lands. HABITABLE HOUSE
- (1) The house must be suitable for residence by the entryman and his family, taking in consideration all the circumstances of the entry and the normal requirements for the establishment of a farm and home.
- F. Whether the entryman has made sufficient improvements which tend to show that he has full intentions to develop a farm and to make it his home for himself and his family. IMPROVEMENTS
- G. Whether all the circumstances tend to show that the entryman has full intention to develop a farm and to make it his home for himself and his family. GOOD FAITH
- H. Whether there is any evidence of attempted illegal alienation of all or part of the entry. ALIENATION
- I. Payment of the required fees including testimony fees, commissions, and purchase money, if any. PAYMENTS
- (1) He will have the money entered into the accounting records.
- J. That proof was made within the statutory period. STATUTORY PERIOD
- K. Whether the person was qualified to make proof, taking into consideration his status as an entryman, heir or devisee, deserted wife, guardian, or authorized representative. QUALIFICATIONS
- L. In the case of heirs, devisees, guardians, deserted wife, and other special classes of entrymen, whether the showings required by the entryman are adequately made. SPECIAL SHOWINGS

ITEM 6
INTERIOR MEMORANDUM

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Washington 25, D.C.

M-36378

January 19, 1956

Memorandum

To: Director, Bureau of Land Management

From: Solicitor

Subject: Desert land entry; water rights; State laws

Your memorandum of March 30 asks whether desert land entries based on the use of certain classes of percolating water may be allowed in California, Colorado, Montana, and Oregon. Our opinion M-36263 of February 23, 1955, as you state in your memorandum, holds that the Desert Land Act (43 U.S.C., sec. 321) does not permit the allowance of a desert land entry based on waters which cannot be appropriated under the law of the State involved. The pertinent laws of the States you refer to are discussed below:

1. California. Although, as your memorandum indicates, percolating waters surplus to the needs of the overlying landowners may be appropriated, such appropriation cannot be considered as meeting the requirements of the statute and the regulations (43 CFR 232.32) which contemplate an "absolute" or "perfect" water right for the permanent irrigation and reclamation of the entry. The overlying landowners' correlative rights to make such reasonable use of percolating water as can be put to a beneficial purpose are superior. Since the overlying landowners, among themselves, are subject to a proportionate reduction in their use of water in case of a shortage, however, it is questionable that even the landowners' rights will meet the statutory and regulatory requirements. Prescriptive rights, however, can be acquired superior to both. If a prescriptive right could be shown applicable to the public land applied for, it would permit allowance of a desert land entry based on the quantity of percolating water so appropriated. Pasadena v. Alhambra, 207 P. (2d) 17 (1949).

2. Colorado. The courts do not appear to have ruled as to whether percolating waters may be appropriated. In Colorado, unlike Arizona, the presumption is that all waters, both surface and underground are tributary to a stream. Safranek v. Town of Limon, 123 Colo. 330, 228 P. (2d) 975 (1951).

The burden of overcoming such a presumption would be on the landowner or anyone else challenging the appropriator's right. Since water tributary to underground streams is subject to appropriation in Colorado, it would be proper to allow a desert land entry based on a prior, valid appropriation of underground water in the absence of evidence overcoming the presumption.

3. Montana. We should be alert to any adjudications which may be made by State officials, since there has not yet been any direct decision on the appropriation of percolating waters in Montana. The cases seem to indicate, however, that percolating waters are subject to the control of the landowner for his reasonable use. Ryan v. Quinlan, 124 Pac. 512, 515 (1912); Rock Creek Ditch and Flume Co. v. Miller, 17 P. 1074, 1077 (1933). An applicant for a desert land entry, therefore, probably could not show a right to percolating waters which meets the requirements of the desert land statute and applicable regulations.

4. Oregon. Desert land entries for public lands in Oregon may be allowed based on appropriation of percolating waters for beneficial use. The ground water act of 1955, Oregon Laws, 1955, c. 708, pp. 955 to 972 has made it clear that underground waters as well as surface waters are subject to prior appropriation. See Oreg. Rev. Stat. Sec. 537.120, which permits appropriation of waters in Oregon only as provided by the 1909 Water Rights Act as amended (Section 537.010). The only exception now appears to be that created by Section 537.710, which relates to spring and seepage waters, arising on private lands, that do not form a water course. Morrison v. Officer, 87 Pac. 896 (1906); Brosnan v. Harris, 65 Pac. 867 (1901).

(Sgd) J. Reuel Armstrong
Solicitor

ITEM 7

**INTERIOR DEC.: RUBY E. HUFFMAN
ET AL., 64 I.D. 58 (1957)**

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Ruby E. Huffman, Frances Torres, and Beulah Mae Choquette, each of whom filed an application to enter land in California under the Desert Land Act (43 U. S. C., 1952 ed., sec. 321 *et seq.*), have appealed to the Secretary of the Interior from a decision by the Acting Director of the Bureau of Land Management dated April 2, 1956, wherein the Acting Director vacated a former Bureau decision dated February 21, 1956. The decision of February 21, 1956, had affirmed the action of the District Range Manager, Bakersfield, California, in canceling in part the grazing lease (Los Angeles 089305) of Sidney Lee Smith in order that the applications of the appellants and others to make desert land entries on the land might be allowed. It held that the land proposed to be eliminated from the Smith lease had been properly classified as suitable for disposition under the Desert Land Act.

The decision of April 2, 1956,¹ which was rendered prior to the expiration of the time granted to Mr. Smith to appeal from the Bureau decision of February 21, 1956, found that the desert land applicants intended to rely for the reclamation of the land applied for on per-

¹ Sidney Lee Smith, Appellant, Mary F. Kershner et al., Appellees, Los Angeles 089305, 087992 et al.

March 21, 1957

colating water to which the applicants had shown no prior right. The Acting Director held that under California law the right to use percolating water underlying land is not such a right as will support the allowance of a desert land entry. He therefore vacated the former decision canceling Mr. Smith's grazing lease in part and rejected the desert land applications.

Thereafter, the appellants took this appeal. Some time later the State Water Rights Board of the State of California, which administers water rights in the State, requested and was granted an opportunity to file a statement on behalf of the appellants. On November 7, 1956, a legal memorandum was submitted by the Board.

The appellants contend that the Acting Director had no jurisdiction to reverse the decision of February 21, 1956, in the absence of an appeal by Mr. Smith and that the decision of April 2, 1956, is erroneous both as to matters of fact and conclusions of law. The appeal does not specify which facts may have been erroneously determined nor does it specify wherein the decision may be erroneous in its interpretation of the law.

With respect to the first contention, it is sufficient to say that the mere fact that a decision has been rendered on a matter within his jurisdiction by the Director, or one acting in his stead, does not cause the Director to lose jurisdiction of the matter. The Director may, before an appeal is taken to the Secretary, reconsider a previous decision, on his own motion, and correct any errors that may have been made in the former decision. It is only after an appeal has been taken to the Secretary that the matter is withdrawn from the jurisdiction of the Director and he cannot, while the appeal is pending in the Department, exercise any further jurisdiction in the matter. *L. D. Crawford, Halvor F. Holbeck*, 61 I. D. 407 (1954). As no appeal had been taken by Mr. Smith from the decision of February 21, 1956, at the time the Acting Director reconsidered the former decision and found it to be erroneous, it is obvious that the matter was still within the jurisdiction of the Acting Director and that he had the authority to vacate the former decision and reject the applications.

The land applied for by the appellants has been found to be land which will not, without irrigation, produce agricultural crops. The soil and topography of the land are of such a character as to render the land susceptible to cultivation if water is available for irrigation. According to a field report no surface water is available for the irrigation of the land. However, according to the same field report, percolating water underlies the land. As shown by the present record, the appellants intend to use this percolating water, which they hope to obtain through the digging of wells on the land to tap the underground source, for the irrigation of the land.

Although the Bureau at first determined that there was probably

sufficient underground water available to the land to justify its classification as suitable for desert land entry, the Acting Director, upon reconsideration, determined that applications for desert land entries covering land in California could not be allowed where the applicants showed merely that they intended to reclaim the land through the use of percolating water to which they had established no prior right. Reconsideration was prompted by a departmental decision rendered on March 12, 1956, involving the allowance of desert land entries in the State of Arizona (*Oma B. Davidson et al.*, 63 I. D. 79 (1956)).

The Desert Land Act requires every applicant for a desert land entry to file a declaration that he intends to reclaim the land applied for by conducting water upon the same, and, further, "That the right to the use of water by the person so conducting the same * * * shall depend upon bona fide prior appropriation." A regulation of the Department (43 CFR 232.13) provides that no application will be allowed unless accompanied by evidence satisfactorily showing that the applicant has already acquired by appropriation, purchase, or contract a right to the permanent use of sufficient water to irrigate and reclaim all of the irrigable portion of the land sought or that he has initiated and prosecuted, as far as then possible, appropriate steps looking to the acquisition of such a right.

As stated above, all that the present appellants have shown is that they hope to acquire sufficient water for the reclamation of the land from the percolating water which they believe underlies the land applied for.

The Solicitor has recently considered the requirements of the Desert Land Act. He held that the rule of prior appropriation—i. e., that the first appropriator of water for a beneficial use has the prior right to the extent of his actual use and that that right is entitled to protection—was a well established doctrine of water law in the western states in 1877 when the Desert Land Act was passed and that, when Congress provided in the act that the right to the use of water by desert land entrymen "shall depend upon bona fide prior appropriation," Congress used the words "prior appropriation" as words of art having a clear and precise meaning. He held that under the doctrine of prior appropriation a prior appropriator acquires a legal right to a definite quantity of water which cannot be diverted by any subsequent appropriator even though the latter could put the water to beneficial use. He held further that the right to appropriate water for the reclaiming of a desert land entry is a matter governed by State law and that whether a desert land entry can be based upon percolating water depends upon whether under the law of a particular State percolating water is subject to the doctrine of prior appropriation. He found that under Arizona law percolating water is not subject to the doctrine of prior appropriation and that therefore applica-

tions for desert land entries in Arizona cannot be allowed where the entries would be dependent upon percolating water for reclamation. Solicitor's Opinion M-36263, 62 I. D. 49 (1955). It was the application by the Department of those principles in the *Davidson* case which caused the Acting Director to reconsider the decision of February 21, 1956.

It becomes necessary therefore to examine the law of California to determine whether under that law the rule of prior appropriation is recognized with respect to percolating water and whether an appropriator of such water for use on overlying land acquires a legal right to a definite quantity of water which cannot be diverted by others.

In examining that law, we find that California has in the past applied both the doctrine of riparian rights and the doctrine of appropriation to the waters of the State. Both of these doctrines were from time to time modified by the California courts, which took cognizance of local conditions in settling controversies between rival users of water. Recognizing a need for the clarification of its water law, in 1928 California adopted an amendment to its constitution (art. XIV, sec. 3) which "compresses into a single paragraph a reconciliation and modification of doctrines evolved in litigations that have vexed its judiciary for a century." The amendment is designed "to serve the general welfare of the State by preserving and limiting both riparian and appropriative rights while curbing either from being exercised unreasonably or wastefully. The amendment * * * now constitutes California's basic water law * * *" *United States v. Gerlach Live Stock Co.* 339 U. S. 725, 743, 751 (1950).

The amendment declares:

* * * that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.

Thus, while California has retained both doctrines, it has limited the amount of water which may be used by either riparian owners or appropriators to that amount of water which may be reasonably required for the beneficial use to be served.

All water flowing in any natural channel except insofar as the water has been or is being applied to useful and beneficial purposes upon or insofar as it may be reasonably needed for useful and beneficial purposes upon land riparian thereto or otherwise appropriated is subject to appropriation under the California law. (Water Code, State of California, secs. 1200-1202.) An appropriation made pursuant to that law has priority of right as of the date of the application to appropriate. (*Id.*, sec. 1450.) However the legislature of the State has provided no statutory method under which percolating water may be appropriated. That is not to say, however, that California does not recognize rights to appropriate and use percolating waters.

The Supreme Court of California has long recognized the right to take percolating water and, while the doctrine of reasonable use was applied at an early date to such taking by overlying landowners, the court recognized that as between one using the water for the benefit of his own overlying land and one diverting the water out of the underground basin for use on distant land, the right of the overlying landowner was paramount. In *Katz et al. v. Walkinshaw*, 74 Pac. 766 (1903), the court said:

* * * In controversies between an appropriator for use on distant land and those who own land overlying the water-bearing strata, there may be two classes of such landowners—those who have used the water on their land before the attempt to appropriate, and those who have not previously used it, but who claim the right afterwards to do so. Under the decision in this case the rights of the first class of landowners are paramount to that of one who takes the water to distant land, but the landowner's right extends only to the quantity of water that is necessary for use on his land, and the appropriator may take the surplus. As to those landowners who begin the use after the appropriation, and who, in order to obtain the water, must restrict or restrain the diversion to distant lands or places, it is perhaps best not to state a positive rule. Such rights are limited at most to the quantity necessary for use, and the disputes will not be so serious as those between rival appropriators. Disputes between overlying landowners, concerning water for use on the land, to which they have an equal right, in cases where the supply is insufficient for all, are to be settled by giving to each a fair and just proportion. And here again we leave for future settlement the question as to the priority of rights between such owners who begin the use of the waters at different times. * * *

In *Burr v. Maclay Rancho Water Co.*, 98 Pac. 260 (1908), the court decided one of the questions left undecided in the *Katz* case. It held that an appropriation of percolating water for use on distant land is subject to the reasonable use of the water by the owner of overlying land, even though the overlying landowner has never used the water. However, it also held that if the overlying owner does not use the

water, the appropriator may take all of the regular supply to distant land until such landowner is prepared to use it and begins to do so. It held the right of an overlying landowner to the use of percolating water to be analogous to that of a riparian landowner to the use of water in a flowing stream.

In *City of San Bernardino v. City of Riverside et al.*, 198 Pac. 784 (1921), the court, after noting that the State had adopted the doctrine that the respective rights of owners of land in percolating waters underlying those lands are reciprocal and correlative, held that while the owner of overlying land who does not use the percolating water underlying his land and whose land is not injured by an exportation of the water to distant land has no right to enjoin such exportation, he may, nevertheless, apply to the court for a judgment declaring his own right and enjoining the taker from making an adverse claim to the water, or from taking it in such quantities or in such manner as to destroy or endanger the source of supply.

After the adoption of the 1928 amendment, the court in *Peabody et al. v. City of Vallejo*, 40 P. 2d 486 (1935), held that the limitations and prohibitions of the constitutional amendment now apply to every water right and every method of diversion. The court reaffirmed the holdings in the *Katz* and *Burr* cases and concluded:

That the rule of reasonable use as enjoined by section 3 of article 14 of the Constitution applies to all water rights enjoyed or asserted in this state, whether the same be grounded on the riparian right or the right, analogous to the riparian right, of the overlying landowner, or the percolating water right, or the appropriative right.

In *Tulare Irr. Dist. et al. v. Lindsay-Strathmore Irr. Dist.*, 45 P. 2d 972 (1935), it was held that the new State policy not only protects the actual reasonable beneficial uses of the riparian or overlying landowner but also protects the prospective reasonable use of such owners as well.

The latest pronouncement by the Supreme Court of California on the subject of percolating waters appears to be that of *City of Pasadena v. City of Alhambra et al.*, 207 P. 2d 17 (1949). The city of Pasadena, the chief producer of water from a basin of ground water, instituted the litigation in 1937 to determine the ground water rights within the area and to enjoin an alleged annual overdraft in order to prevent eventual depletion of the supply. The principal issues presented on appeal were whether the trial court properly limited the amount of water that one of the defendants, the sole appellant, could take from the ground in the area and whether it erred in placing the burden of curtailing the overdraft proportionately on all parties. In affirming the trial court the court said:

Although the law at one time was otherwise, it is now clear that an overlying owner or any other person having a legal right to surface or ground water may

take only such amount as he reasonably needs for beneficial purposes. * * * Any water not needed for the reasonable beneficial uses of those having prior rights is excess or surplus water. In California surplus water may rightfully be appropriated on privately owned land for non-overlying uses, such as devotion to a public use or exportation beyond the basin or watershed. * * *

* * * Proper overlying use, however, is paramount, and the right of an appropriator, being limited to the amount of the surplus, must yield to that of the overlying owner in the event of a shortage, unless the appropriator has gained prescriptive rights through the taking of non-surplus waters. As between overlying owners, the rights, like those of riparians, are correlative and are referred to as belonging to all in common; each may use only his reasonable share when water is insufficient to meet the needs of all. * * * As between appropriators, however, the one first in time is the first in right, and a prior appropriator is entitled to all the water he needs, up to the amount that he has taken in the past, before a subsequent appropriator may take any. * * *

Prescriptive rights are not acquired by the taking of surplus or excess water, since no injunction may issue against the taking and the appropriator may take the surplus without giving compensation; however, both overlying owners and appropriators are entitled to the protection of the courts against any substantial infringement of their rights in water which they reasonably and beneficially need. * * * Accordingly, an appropriative taking of water which is not surplus is wrongful and may ripen into a prescriptive right where the use is actual, open and notorious, hostile and adverse to the original owner, continuous and uninterrupted for the statutory period of five years, and under claim of right. * * *

In the present case some of the parties * * * have pumped water solely for use on their own land, and their rights at the outset were overlying. The principal takers of water, however, are public utility corporations and municipalities which have either exported water or have used it within the Western Unit for municipal purposes or for sale to the public, and their taking, when commenced, was entirely appropriative. * * *

It follows from the foregoing that, if no prescriptive rights had been acquired, the rights of the overlying owners would be paramount, and the rights of the appropriators would depend on priority of acquisition under the rule that the first appropriator in time is the first in right. * * * If such were the case, the overdraft could be eliminated simply by enjoining a part of the latest appropriations, since the record shows that there is ample water to satisfy the needs of all the overlying users and most of the appropriators * * *. [Pp. 28-29.]

The court then found that there had been an actual adverse user of water in the area; that there had been a mutual invasion of the rights of both overlying owners and appropriators commencing in the year 1913, when the overdraft first occurred; that each taking of water in excess of the safe yield was wrongful; that the proper time to act to preserve the supply is when the overdraft commences; and that the evidence was sufficient to charge appellant with notice that there was a deficiency rather than a surplus and that the takings causing the overdraft were invasions of the rights of overlying owners and prior appropriators.

The court then said:

Neither the overlying owners nor the appropriators took steps to obtain the aid of the courts to protect their rights until the present action was instituted,

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many years after the commencement of the overdraft, and at first glance it would seem to follow that the parties who wrongfully appropriated water for a period of five years would acquire prior prescriptive rights to the full amount so taken. The running of the statute, however, can effectively be interrupted by self help on the part of the lawful owner of the property right involved. Unlike the situation with respect to a surface stream where a wrongful taking by an appropriator has the immediate effect of preventing the riparian owner from receiving water in the amount taken by the wrongdoer, the owners of water rights in the present case were not immediately prevented from taking water, and they in fact continued to pump whatever they needed. * * * The owners were injured only with respect to their rights to continue to pump at some future date. The invasion was thus only a partial one, since it did not completely oust the original owners of water rights, and for the entire period both the original owners and the wrongdoers continued to pump all the water they needed.

The pumping by each group, however, actually interfered with the other group in that it produced an overdraft which would operate to make it impossible for all to continue at the same rate in the future. If the original owners of water rights had been ousted completely or had failed to pump for a five-year period, then there would have been no interference whatsoever on the part of the owners with the use by the wrongdoers, and the wrongdoers would have perfected prior prescriptive rights to the full amount which they pumped. As we have seen, however, such was not the case, and although the pumping of each party to this action continued without interruption, it necessarily interfered with the future possibility of pumping by each of the other parties by lowering the water level. The original owners by their own acts, although not by judicial assistance, thus retained or acquired a right to continue to take some water in the future. The wrongdoers also acquired prescriptive rights to continue to take water, but their rights were limited to the extent that the original owners retained or acquired rights by their pumping.

* * *

We hold, therefore, that prescriptive rights were established by appropriations made in the Western Unit subsequent to the commencement of the overdraft, that such rights were acquired against both overlying owners and prior appropriators, that the overlying owners and prior appropriators also obtained, or preserved, rights by reason of the water which they pumped, and that the trial court properly concluded that the production of water in the unit should be limited by a proportionate reduction in the amount which each party had taken throughout the statutory period. [Pp. 31-33.]

In brief, the principles set forth by the California courts in the cases just discussed, which did not involve public lands, are as follows: Percolating water is, first, subject to the needs, both present and prospective, of overlying landowners whose rights therein are correlative and proportionate. The right of an overlying landowner is not to a definite quantity of water but only to a proportionate share, with other overlying landowners, of such percolating water as he can put to a reasonable beneficial use on the overlying land. Only that portion of percolating water surplus to the needs of overlying landowners in a basin may legally be appropriated and then only for nonoverlying uses. While an appropriator of surplus water may use the water as long as it is not being used by the overlying landowners, he acquires no right to the continued use of the surplus except as against subsequent appro-

priators. His use of the water must yield to the needs of the overlying landowners in the event of a shortage.

On the premise that a desert land entryman has only the correlative right of an overlying landowner to percolating water, the Acting Director held that such a right would not meet the requirements of the Desert Land Act. If this premise is sound, the conclusion would be inescapable. There is no sound basis for holding that a correlative or overlying right is equivalent to an appropriative right.

The State Water Rights Board questions the premise. It asserts that *Pasadena v. Alhambra* was not concerned with public lands or desert land entries and that the principles enunciated in the decision are inapplicable to public lands. The Board declares that there is no other California case on the question and that therefore it is necessary to look to analogous cases to ascertain what rules the California courts would apply to desert land entries on public land.

The argument of the Board appears to run as follows: The California courts have often said that the overlying right is analogous to the riparian right of one owning land abutting on a watercourse. Both rights exist solely by reason of the situation of land with respect to a supply of water. Title to riparian and overlying rights is acquired in the same way—by acquiring title to the land. Neither right is based upon use of water and neither is lost (in the absence of prescription) by disuse. Ordinarily, neither right is measured by a specific quantity of water.

With respect to riparian rights, the California courts have held that riparian rights do not attach to public lands until ownership of the land has passed from the United States. *McKinley Bros. v. McCauley*, 9 P. 2d 298 (1932); *San Joaquin & Kings River Canal & Irr. Co. v. Worswick*, 203 Pac. 999 (1922); *Rindge v. Crags Land Co.*, 205 Pac. 36 (1922). When title to riparian public land passes, riparian rights attach to the land not as of the date of patent but as of the date of entry or even settlement upon the land. *Haight v. Costanich*, 194 Pac. 26 (1920); *Pabst v. Finmand*, 211 Pac. 11 (1922). Nonetheless, despite the relation back of riparian rights once title has passed, until there has been a transfer of title, the occupant of the public land cannot claim a riparian right. During that period, however, he can appropriate water and has the right to the use of water to the extent of his appropriation for a reasonable beneficial use.*

As to the relationship of his appropriative rights to riparian rights in the same watercourse, the California courts have held that appropriative rights on public lands are superior to the riparian rights of those acquiring abutting public lands at a later date, whether upstream or

* The appropriative right is not lost upon the passage of title. It can still be asserted by the patentee although he has now acquired riparian rights. In other words, a riparian landowner can have both appropriative and riparian rights. *Rindge v. Crags Land Co.*, *supra*.

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downstream from the point of appropriation. *Rindge v. Craggs Land Co.*, *supra*; *San Joaquin & Kings River Canal & Irr. Co. v. Worswick*, *supra*; *Utt v. Frey*, 39 Pac. 807 (1895); *Barrows v. Fox*, 32 Pac. 811 (1893). While perhaps most of the California cases on this point concern situations where one went on public land abutting a stream and took water for use on nonriparian land, whether public or privately owned, the court has applied the same rule in at least one case where the appropriation was made by an occupant of riparian public land for use on that land. *McKinley Bros. v. McCauley*, *supra*; see also *McGuire v. Brown*, 39 Pac. 1060 (1895). Where riparian rights on a watercourse have been established before the appropriation is made on public land abutting the watercourse, the appropriation is subordinate to the previously established riparian rights. *Hargrave v. Cook*, 41 Pac. 18 (1895).

The California courts have applied a different rule in the case of appropriations made on private lands. The courts have held that where an appropriation is made on private lands, the appropriative right is inferior to the riparian rights of one who later acquires riparian public land upstream. *Cave v. Tyler*, 65 Pac. 1089 (1901); *Cory v. Smith*, 274 Pac. 969 (1929); *San Joaquin & Kings River Canal & Irr. Co. v. Worswick*, *supra*.³

Applying these principles to overlying rights to percolating waters, the State Water Rights Board apparently contends that the correlative right of an overlying landowner to percolating water underlying the land does not attach to public land until title to the land has passed out of Government ownership and that, until title passes, a desert land entryman on the land has a right to appropriate the percolating water for use on his entry. Therefore, the Board concludes, the right of a desert land entryman to the use of percolating water for the reclamation of his entry is dependent upon bona fide prior appropriation and thus meets the requirements of the Desert Land Act. The Board would presumably agree that upon the patenting of a desert land entry, the correlative right of an overlying landowner would attach to the patented land as of the date on which the entry was made. However, as in the case of an entryman on riparian public land, the only right an entryman on overlying public land would have prior to patent would be a right of appropriation.

The Board's position that a desert land entryman has a right to appropriate underlying percolating water for the reclamation of his entry has support in the California court cases which have been cited. The question then is whether this right of appropriation satisfies the requirement of the Desert Land Act that "the right to the use of water * * * shall depend upon bona fide prior appropriation."

³ The principles just discussed are set forth in Hutchins, *The California Law of Water Rights* (1956), pp. 56-62.

In a ground water basin where all the land is public land, the answer would seem obvious. If desert land entries were allowed in such a basin, the only rights to the use of percolating waters that the entrymen would have would be rights dependent upon appropriation, and among themselves their relative rights would depend upon priority of use. Thus, until the entries went to patent, the only doctrine of water rights that would exist in the basin would be the doctrine of bona fide prior appropriation. Even after the entries went to patent, which would result in the patentees becoming vested with the correlative rights of overlying landowners, such rights would be subordinate to already established appropriative rights. It would seem clear then that the appropriative rights of entrymen in this type of situation would meet the requirements of the Desert Land Act.

However, the situation would be different in a ground water basin where a substantial amount of land is in private ownership at the time when a desert land entry is allowed on public land in the basin. The entryman's right to the use of percolating water would still be a right based upon appropriation but it would be subordinate to the correlative rights of the private landowners. The entryman would have only the right to appropriate water surplus to the needs of the landowners. He would be in the same position as the appropriators of water for distant land in *Pasadena v. Alhambra*. In other words, he would have a second ranking type of water right, correlative rights occupying the top rank.

This presents the question whether a second ranking class of water rights, although based on appropriation, satisfies the Desert Land Act. The language of the act is that the entryman's right "shall depend upon bona fide prior appropriation." Literally read, this language seems to require no more than that an entryman have an appropriative water right, regardless of whether appropriative rights are superior or subordinate to other classes of water rights, such as riparian or correlative rights. Some doubt, however, is cast upon this interpretation by statements of the United States Supreme Court in the case of *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U. S. 142 (1935). In that case the Court had before it the question whether a homestead patent issued in 1885 for land abutting on a stream carried with it the common law riparian right. The Court held that it did not, declaring that the Desert Land Act severed water from the soil and that the patent simply conveyed title to the land. In reaching this result the Court delved into the background of the Desert Land Act, making the following statements which have a relevance to the question at hand:

For many years prior to the passage of the Act of July 26, 1866, c. 262, § 9, 14 Stat. 251, 253, the right to the use of waters for mining and other beneficial purposes in California and the arid region generally was fixed and regulated by local rules and customs. The first appropriator of water for a beneficial use was uni-

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formly recognized as having the better right to the extent of his actual use. *The common law with respect to riparian rights was not considered applicable, or, if so, only to a limited degree.* * * * The rule generally recognized throughout the states and territories of the arid region was that the acquisition of water by prior appropriation for a beneficial use was entitled to protection * * * . [P. 154.]

* * * That body [the Congress] thoroughly understood that an enforcement of the common-law rule, by greatly retarding if not forbidding the diversion of waters from their accustomed channels, would disastrously affect the policy of dividing the public domain into small holdings and effecting their distribution among innumerable settlers. In respect of the area embraced by the desert-land states, with the exception of a comparatively narrow strip along the Pacific seaboard, it had become evident to Congress, as it had to the inhabitants, that the future growth and well-being of the entire region depended upon a *complete adherence* to the rule of appropriation for a beneficial use as the *exclusive criterion* of the right to the use of water. * * * [P. 157.] Necessarily, that involved the *complete subordination* of the common-law doctrine of riparian rights to that of appropriation. * * * [P. 158.]

In the light of the foregoing considerations, the Desert Land Act was passed, and in their light it must now be construed. * * * [P. 158; italics added.]

These statements suggest that Congress intended that the Desert Land Act should be applicable in States where the doctrine of prior appropriation was the exclusive or predominant doctrine of water rights and that entrymen must have a top ranking class of water right, not one that is subordinate to riparian or similar rights. On the other hand it is possible to construe the Court's statements as saying only that with respect to public lands the doctrine of prior appropriation must attach, regardless of the relation of that doctrine to the doctrine of water rights appertaining to privately owned lands. In this view it would be sufficient that one entering on desert public land has a water right based upon appropriation regardless of whether that right rates below the riparian or correlative right of his neighbors on privately owned lands.

To sum up at this point, we are confronted with two questions as to which the courts have not spoken: (1) whether under California law a desert land entryman, prior to patent, has an appropriative or only a correlative right to the use of percolating water for the reclamation of his entry, and (2), if he has an appropriative right, whether it is such an appropriative right as is intended by the Desert Land Act. Although the answers to these questions are far from clear, it is my opinion that there is sufficient support for the position that desert land entrymen do have appropriative rights and that such rights satisfy the requirements of the act so that the Department would not be warranted in holding that desert land applications must be rejected as a matter of law because the applicants intend to rely upon percolating water for reclamation. This does not mean, of course, that applications cannot be rejected in the exercise of the Secretary's authority under section 7 of the Taylor Grazing Act, as

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amended (43 U. S. C., 1952 ed., sec. 315f), to classify land as suitable or not suitable for desert land entry if he determines that there is an insufficient supply of percolating water to enable the reclamation of the entries, taking into consideration the rights and needs of other lands for such percolating water.

The Director's decision of February 21, 1956, had sustained the classification of the land in the appellants' applications as being suitable for desert land entry. This decision was vacated on April 2, 1956, solely on the ground that under California law the right to use percolating water to reclaim a desert land entry is not a right based upon prior appropriation. In view of the conclusion reached in the instant proceeding, it is apparent that the decision of April 2, 1956, must be reversed as to the three appellants, which will leave the decision of February 21, 1956, operative as to them.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 28, Order No. 2509, as revised: 17 F. R. 6794), the Acting Director's decision of April 2, 1956, is reversed as to the three appellants and the case is remanded for further action on their applications pursuant to the decision of February 21, 1956.⁵

J. REUEL ARMSTRONG,

Solicitor.

ITEM 8

Excerpt from Hemmer v. United States
204 F. 898 (S.D. 1912), affd. 241 U.S. 379

Judge Sanborn of the Eighth Circuit Court of Appeals, in reviewing the question whether section 189 of Title 43 was amended, modified or repealed by this section said in the case of Hemmer v. U. S., S.D. 1912, 204 F. 898, 123 C.C.A. 194, affirmed 36 S.Ct. 659, 241 U.S. 379, 60 L.Ed. 1055:

"The act of 1875 section 189 of this title was a special law on the subject of Indian homesteads, limited to a small and specific class of Indians, those who had abandoned or should abandon their tribal relations, and it granted the right to homesteads to members of this class only under the restriction of 5 years upon their alienation. The act of 1884 this section was a general law on this subject of Indian homesteads, and it granted to Indians, whether they had abandoned their tribal relations or not, rights to homesteads subject to restrictions for 25 years on their alienation. The first and most impressive characteristic of the later act, when it is examined to ascertain its effect upon the earlier one, is that it contains no terms or words whatever that indicate any intent on the part of the legislators to amend, modify, repeal, or affect in any way the act of 1875, the restriction upon alienation there imposed, or any of its other provisions. The act of 1884 contains no reference to the act of 1875, or to any of its provisions, and it does not even contain a clause repealing acts or parts of acts inconsistent with its own provisions.

"Privileges granted to a certain class by special act are not affected by inconsistent general legislation, unless a contrary intent of the legislative body is clearly expressed or indubitably inferable therefrom. But the special act and the general law stand together, the one as the law of the particular class and the other as the general rule. . . .

"Finally: 'All statutes in pari materia are to be read and construed together as if they formed part of the same statute and were enacted at the same time.' Potter, Dwar.St. 145; Board of Com'rs of Seward County, Kan., v. Aetna Life Ins. Co. (Kan. 1898) 90 F. 222, 227 32 C.C.A. 585, 590.

"If the act of 1875 and the act of 1884 be read as one act passed at the same time, they provide that there is granted to nontribal Indians the right to acquire homesteads upon payment of the officers' fees subject to a restriction on alienation for 5 years, and that there is granted to all Indians the right to acquire homesteads subject to a restriction on alienation for 25 years without the payment of any officers' fees. Every provision of each act has its complete effect, every promise of the government is fulfilled, every right of each

homesteader is preserved and protected, and every rule of construction is obeyed. If the act of 1884 be read as an amendment of the act of 1875 and given the effect of an amendment or modification thereof, and of an imposition upon the lands of homesteaders under that act of a restriction upon their alienation for 20 years more than the 5 years fixed by the act of 1875, the offer and promise of the United States contained in that act is broken, the rights of the homesteaders under it are violated, the provision of the act of 1875 which granted to nontribal Indians the right to homesteads with a restriction on alienation of only 5 years, is annulled and the indisputable canons of interpretation which have been cited are disregarded. Our conclusion is that the Act July 4, 1884, 23 Stat. 96, does not repeal or modify any of the provisions of Act of March 3, 1875, 18 Stat. 402, 420; that all the provisions of the two acts stand together and remain in force; that the act of 1875 grants to nontribal Indians the right to acquire homesteads with a restriction of only 5 years on their alienation; that the act of 1884 grants to all Indians the right to homesteads with a restriction of 25 years on alienation; and that the latter act did not have the effect to extend the restriction on the alienation of the land of Taylor, a homesteader, under the act of 1875 from 5 years to 25 years, or to affect that restriction in any way."

APPENDIX E

TABLE OF SELECTED STATUTES OF THE ELEVEN WESTERN STATES CONCERNED WITH CLASSIFICATION, APPRAISAL, SALE AND LEASE OF STATE LANDS

SUBJECT	CALIFORNIA	OREGON	WASHINGTON*
CAREY ACT	None	Chap. 555 of Title 45, Ore. Rev. Stat. (1955)	Chap. 79.48, Rev. Code of Wash. Ann. (1962)
APPRAISAL & CLASSIFICATION OF STATE LANDS	Cal. Pub. Res. Code §6201 (1968) Cal. Pub. Res. Code §6503 (1968)	Ore. Rev. Stat. §273.051 (1967) Ore. Rev. Stat. §273.201 (1967) Ore. Rev. Stat. §273.251 (1967)	Wash. Const. art. §1 (1889) Rev. Code of Wash. Ann. §43.30.150 (19 Rev. Code of Wash. Ann. §79.01.092 (19 Rev. Code of Wash. Ann. §79.01.116 (19
SALE OF STATE LANDS	Cal. Const. art. 17 §3 (1879) Cal. Pub. Res. Code §6223 (1968) Cal. Pub. Res. Code §7301 (1968) Cal. Pub. Res. Code §§7351-7362 (1968) Cal. Pub. Res. Code §§7701-7705 (1968)	Ore. Const. art. VIII §5 (1859) Ore. Rev. Stat. §§273.255-.275 (1967) Ore. Rev. Stat. §273.230 (1967)	Wash. Const. art. §2 (1889) Wash. Const. art. §4 (1889) Rev. Code of Wash. Ann. §79.01.088 (19 Rev. Code of Wash. Ann. §79.01.096 (19 Rev. Code of Wash. Ann. §79.01.184 (19 Rev. Code of Wash. Ann. §79.01.200 (19 Rev. Code of Wash. Ann. §79.01.216 (19 Rev. Code of Wash. Ann. §79.01.224 (19 Rev. Code of Wash. Ann. §79.01.301 (19
LEASING OF STATE LANDS	Cal. Pub. Res. Code §6223 (1968) Cal. Pub. Res. Code §6501.1 (1968) Cal. Pub. Res. Code §6502 (1968)	Ore. Rev. Stat. §271.310 (1967)	Rev. Code of Wash. Ann. §79.01.088 (19 Rev. Code of Wash. Ann. §79.01.096 (19 Rev. Code of Wash. Ann. §79.01.244 (19 Rev. Code of Wash. Ann. §79.01.276 (19 Rev. Code of Wash. Ann. §79.01.300 (19
			*See also Chap. 89 Rev. Code of Wash. Ann. which establish es State land sett ment and reclamation program.

SUBJECT	COLORADO	NEW MEXICO	ARIZONA*
EAREY ACT	Art. 2 of Chap. 112, Colo. Rev. Stat. Ann. (1963) (§§112-2-20 and 112-2-25 were amended in 1965)	Art. 4 of Chap. 7, N.M. Stat. Ann. (1966)	Art. 1 of Chap. 3 of Title 37, Ariz. Rev. Stat. Ann. (1956)
APPRAISAL & CLASSIFICATION OF STATE LANDS	Colo. Rev. Stat. Ann. §§112-3-8, -9, -11	N.M. Const. art. XIII §2 (1911) N.M. Stat. Ann. §7-6-1 (1966) N.M. Stat. Ann. §7-8-1	Ariz. Const. art. 10 §4 (1910) Ariz. Rev. Stat. Ann. §37-101 (1956) Ariz. Rev. Stat. Ann. §37-132(A)(5) (1956) Ariz. Rev. Stat. Ann. §37-211 (1956) Ariz. Rev. Stat. Ann. §37-212 (1969) Ariz. Rev. Stat. Ann. §37-282 (1956)
MANAGEMENT OF STATE LANDS	Colo. Const. art. IX §10 (1876) Colo. Rev. Stat. Ann. §112-3-23 (1963) Colo. Rev. Stat. Ann. §112-3-25 (1967) Colo. Rev. Stat. Ann. §112-3-26, -38 (1963) Art. 5 of Chap. 112, Colo. Rev. Stat. Ann. (1963)	N.M. Const. art. XIII §1 (1911) N.M. Stat. Ann. §7-8-1 (1966) N.M. Stat. Ann. §7-8-9 (1966) N.M. Stat. Ann. §7-8-27 (1966) N.M. Stat. Ann. §7-11-21 (1966)	Ariz. Const. art. 10 §3 (1910) Ariz. Const. art. 10 §5 (1910) Ariz. Const. art. 10 §11 (1910) Ariz. Rev. Stat. Ann. §37-105 (1956) Ariz. Rev. Stat. Ann. §37-231 (1969) Ariz. Rev. Stat. Ann. §§37-232 to -240 (1956) Ariz. Rev. Stat. Ann. §37-242, -244 (1956) Ariz. Rev. Stat. Ann. §37-241 (1969) Ariz. Rev. Stat. Ann. §37-251 (1969)
ACQUISITION AND DISPOSAL OF STATE LANDS	Colo. Const. art. IX §10 (1876) Colo. Rev. Stat. Ann. §§112-3-13, -14, -17, -18, -19 (1963)	N.M. Stat. Ann. §7-8-1 (1966) N.M. Stat. Ann. §7-8-28 (1966) N.M. Stat. Ann. §7-8-29 (1966) N.M. Stat. Ann. §7-8-31 (1966) N.M. Stat. Ann. §7-8-37 (1966) N.M. Stat. Ann. §7-8-53, -56 (1966)	Ariz. Const. art. 10 §3 (1910) Ariz. Rev. Stat. Ann. §37-105 (1956) Ariz. Rev. Stat. Ann. §37-281 (1969) Ariz. Rev. Stat. Ann. §37-284 (1969) Ariz. Rev. Stat. Ann. §37-285 (1956)
			*See also, art. 7 of Chap. 2 of Title 37, Ariz. Rev. Stat. Ann. (1956) which establishes a state land settlement and reclamation program.

SUBJECT	IDAHO	NEVADA	WYOMING
CAREY ACT	Chaps. 20, 21 of Title 42, Idaho Code Ann. (1948)	Chap. 324, Nev. Rev. Stat. (1967)	Wyo. Const. art. 18 §1 (1890) Chap. 8 of Title 36 Wyo. Stat. Ann. (1957)
APPRAISAL & CLASSIFICATION OF STATE LANDS	Idaho Code Ann. §58-301 (1948) Idaho Code Ann. §§58-132, -133 (1948)	Nev. Rev. Stat. §32.335(3) (1967)	Wyo. Const. art. 18 §1 (1890) Wyo. Stat. Ann. §36-18 (1957)
SALE OF STATE LANDS	Idaho Const. art. 9 §8 (1890) Idaho Code Ann. §§58-313, -314, -316 (1967) Idaho Code Ann. §58-317 (1948)	Nev. Rev. Stat. §321.080 (1967) Nev. Rev. Stat. §321.335 (1967)	Wyo. Const. art. 18 §§1-4 (1890) Wyo. Stat. Ann. §36-181 (1957) Wyo. Stat. Ann. §36-182 (1967) Wyo. Stat. Ann. §§36-183 to -85 (1957) Wyo. Stat. Ann. §36-186 (1967)
LEASING OF STATE LANDS	Idaho Const. art. 9 §8 (1890) Idaho Code Ann. §58-304 (1948) Idaho Code Ann. §58-305 (1967) Idaho Code Ann. §§58-307, -308 (1948) Idaho Code Ann. §58-310 (1967) Idaho Code Ann. §§58-329, -330 (1948)	Nev. Rev. Stat. §322.050 (1967) Nev. Rev. Stat. §322.060 (1967)	Wyo. Const. art. 18 §§2-4 (1890) Wyo. Stat. Ann. §36-19 (1957) Wyo. Stat. Ann. §§36-62 to -65 (1957) Wyo. Stat. Ann. §§36-66, -68 (1967) Wyo. Stat. Ann. §36-69 to -73 (1957)

SUBJECT	UTAH	MONTANA*	
CAREY ACT	Chap. 3 of Title 65, Utah Code Ann. (1968)	None	
APPRAISAL & CLASSIFICATION OF STATE LANDS	Utah Code Ann. §65-1-24 (1968) Utah Code Ann. §65-1-26 (1968) Utah Code Ann. §65-1-28 (1968)	Mont. Const. art. XVII §1 (1889) Rev. Codes of Mont. Ann. §81-302 (1966)	
LEASE OF STATE LANDS	Utah Code Ann. §65-1-14 (1968) Utah Code Ann. §65-1-24 (1968) Utah Code Ann. §§65-1-29 to -33 (1968) Utah Code Ann. §65-1-42 (1968) Utah Code Ann. §§65-5-1 to -4 (1968)	Mont. Const. art. XVII §2 (1889) Mont. Const. art. XIX §7 (1889) Rev. Codes of Mont. Ann. §§81-901, -902 (1966) Rev. Codes of Mont. Ann. §81-906 (1966) Rev. Codes of Mont. Ann. §§81-907 to -909 (1966) Rev. Codes of Mont. Ann. §81-912 (1966) Rev. Codes of Mont. Ann. §81-919 (1966)	
LEASEING OF STATE LANDS	Utah Code Ann. §65-1-14 (1968) Utah Code Ann. §65-1-24 (1968) Utah Code Ann. §65-1-108 (1968) Utah Code Ann. §§65-5-1 to -4 (1968)	Mont. Const. art. XVII §2 (1889) Mont. Const. art. XIX §7 (1889) Rev. Codes of Mont. Ann. §§81-401, -402 (1966) Rev. Codes of Mont. Ann. §§81-405 to -416 (1966) Rev. Codes of Mont. Ann. §81-421 (1966)	
		*See also, the Rev. Codes of Mont. Ann. §§81-2401 to -2408 (1967) which outlines a general plan of de- velopment for state land resources.	

APPENDIX F

A LIST OF POSSIBLE ALTERNATIVES TO THE PRESENT SYSTEM OF FEDERAL PUBLIC LAND LAWS AND POLICIES RELATING TO INTENSIVE AGRICULTURE

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ALTERNATIVE NO. 1

The Homestead Laws
Should Be Repealed

A. Summary

This proposal provides for the repeal of all of the homestead laws.

B. Purpose

The purpose is to repeal obsolete laws. The present acreage limitations under the homestead laws do not permit the establishment of economic farm units. The best of the public lands suitable for agriculture were, for the most part, transferred out of federal ownership many years ago. The relatively few tracts of remaining public land suitable for agricultural settlement are the type that generally require the expenditure of substantial sums in order to make them productive and involve the taking of considerable risks. An individual without financial resources cannot meet these expenditures. Therefore, the homestead laws are no longer of any value in helping individuals without funds to get a start in life.

C. Key Feature

The homestead laws would be repealed subject to existing valid rights and obligations.

D. Probable Advantages

This would eliminate a number of obsolete laws which are virtually unused today outside of Alaska. It would eliminate the necessity of the Bureau of Land Management having to accept and process homestead applications which are almost certain to be denied. It would prevent speculators who want federal land for purposes other than farming from obtaining patents through the use of laws never intended for their benefit.

E. Probable Disadvantages

This would end the possibility of individuals obtaining free federal land with the hope of establishing themselves as farmers.

VARIATION TO ALTERNATIVE NO. 1

VARIATION NO. 1-A

THE HOMESTEAD LAWS SHOULD BE REPEALED OR MADE INEFFECTIVE IN ALL STATES EXCEPT ALASKA.

A. Summary

This variation would differ from No. 1 in that the homestead laws would remain in effect in Alaska.

B. Purpose

The objective is to repeal the homestead laws in the 48 contiguous states and Hawaii, where there is no longer any appreciable homesteading and virtually no land suitable for homesteading under the provisions of the present laws, but to continue to permit homesteading in Alaska, which contains about 50% of the remaining public domain.

C. Key Feature

The homestead laws would be repealed in all states except Alaska, subject to existing valid rights and obligations.

D. Probable Advantages

Same as for No. 1 but would permit homesteading to continue in Alaska.

E. Probable Disadvantages

Same as for No. 1. Would require the government to continue to process applications in Alaska even though the probable chances of an applicant succeeding in his endeavor are slim.

ALTERNATIVE NO. 2

The Desert Land Laws Should Be Repealed

A. Summary

This proposal provides for the repeal of the Desert Land Laws.

B. Purpose

The purpose is to repeal laws that are generally obsolete and seldom used effectively today. The present acreage limitations in the laws are so low that it is almost impossible for anyone to establish an economic farm unit on the quantity of land available. The best of the desert lands having agricultural potential and water were, for the most part, transferred out of federal ownership years ago. The few remaining tracts that may be put in agricultural production can generally be done so only if there are substantial investments in land preparation and irrigation works and these investments can be undertaken only by persons with adequate capital.

C. Key Feature

The desert land laws will be repealed subject to existing valid rights and obligations.

D. Probable Advantages

This would eliminate a number of laws which are virtually obsolete. It would eliminate the necessity of the Bureau of Land Management having to accept and process numerous applications almost all of which are certain to be denied. It would put an end to attempts by speculators to obtain title to federal land which they intend to dispose of once a patent is issued or which they intend to put to uses other than agriculture. It would prevent additional lands being put into production in areas that are already overdrawing on their existing water supply.

E. Probable Disadvantages

This would prevent people from attempting to establish themselves in farming operations through aid of cheap federal land. It would stifle the incentive for trying to develop areas which are now unproductive and of no real value to our nation.

ALTERNATIVE NO. 3

The Indian Allotment Laws Should Be Repealed

A. Summary

This proposal provides for the repeal of the Indian homestead and allotment laws governing allotments off of reservations.

B. Purpose

The purpose is to repeal obsolete laws. The present allotment laws provide for 40 acres of irrigable land, 80 acres of nonirrigable land or 160 acres of grazing land. In each of these cases the quantity of land generally does not constitute an economic unit. Also there are relatively few tracts of public land which may be classified as agricultural land suitable for settlement and capable of adequately supporting a family. At the time the allotment laws were passed Indians did not enjoy full citizenship, but at the present time they do and it is no longer necessary to have special allotment laws for them.

C. Key Feature

The Indian homestead and allotment laws would be repealed subject to existing valid rights and obligations.

D. Probable Advantages

This would eliminate a number of obsolete laws which are virtually unused today. It would eliminate the necessity of the Bureau of Land Management having to accept and process applications for Indian allotments which almost inevitably are eventually rejected.

E. Probable Disadvantages

As virtually no Indians are able to obtain allotments anymore this alternative would have no effect on existing conditions and therefore no disadvantages. However, what is an apparent, but not real, benefit to a particular class of citizens would be ended and this might be considered a disadvantage by that class.

ALTERNATIVE NO. 4

The Acreage Limitations of the Various Agricultural Land Laws Should Be Increased to the Extent Necessary to Permit the Establishment of Economic Farm Units

A. Summary

This proposal calls for increasing the acreage an entryman can obtain for agricultural use to the amount necessary for an economic farm unit.

B. Purpose

The present acreage limitations generally do not permit an entryman to obtain enough land to establish an economically feasible farming operation. Therefore, most entrymen under the present agricultural land laws are either speculators who do not intend to farm the land permanently or overly optimistic persons who are probably doomed to fail in their efforts to establish a successful farming operation.

C. Key Feature

The acreage limitations in the present laws would be increased to the amounts determined by the resources portion of the intensive agricultural study to be sufficient to permit economic farm units.

D. Probable Advantages

This would enable those obtaining land under the agricultural land laws to develop successful farms on the land, which is the intent of these laws. It would permit that part of the public domain that is chiefly valuable for agricultural purposes to be disposed of and put into permanent cultivation.

E. Probable Disadvantages

Every time the amount of land one person can obtain from the government is increased it necessarily means that fewer persons will be able to obtain a share of the federal land available for disposal.

VARIATION TO ALTERNATIVE NO. 4

VARIATION NO. 4-A

ACREAGE LIMITATIONS SHOULD VARY FROM AREA TO AREA TO TAKE ACCOUNT OF DIFFERENCES IN SUCH FACTORS AS SOILS, CLIMATE, TOPOGRAPHY, IRRIGATION WATER, ACCESS TO MARKETS, AND OTHER FACTORS THAT AFFECT THE ECONOMICS OF FARMING.

A. Summary

This variation provides for different acreage limitations in different areas depending upon the various factors which affect the amount of land needed in each area for an economic farm unit.

B. Purpose

The objective of this variation is to permit recognition of differing conditions throughout the public domain.

C. Key Feature

The objective can be accomplished either by enacting statutes establishing different acreage limitations for areas having different conditions or by delegating authority to the Secretary of the Interior to fix the acreage limitations.

D. Probable Advantages

This would permit recognition of the fact that the public domain is not a homogenous area but is scattered throughout much of the western United States in areas which differ remarkably in characteristics. It would permit the establishment of economic farm units throughout the public domain while at the same time preventing an entryman from obtaining more acreage than required in his area for a family farm.

E. Probable Disadvantages

This would be harder to administer than uniform limitations. If the authority to establish different acreage limitations is delegated to the executive branch, there will probably be continuous pressure both to raise and lower the limitations and to make exceptions. If the limitations are set forth in statutes, the established limitations might be too inflexible to properly take into account the relevant differences between various areas.

ALTERNATIVE NO. 5

The Federal Government Should Receive Full Value in Return for all Land Disposed of for Agricultural Use

A. Summary

This proposal requires patentees to pay full value for any land obtained for agricultural purposes.

B. Purpose

The objective is to provide a full return to the government for any land disposed of and end the granting of subsidies in the form of land grants at less than full market value. When the small amount of remaining public domain suitable for intensive agricultural use is compared to our population today, it is readily apparent that it is no longer possible to offer free land to all who want to accept the challenge of attempting to establish a farm homestead on virgin ground. At the most only a small fraction of the people can possibly enter the remaining public domain suitable for agriculture. The only method of disposal that is fair to all is to sell the land at full value and thereby prevent a windfall to any citizens.

C. Key Feature

Any remaining public domain to be disposed of would be sold for the fair market value at prices established by objective appraisals or in the alternative by competitive bidding. The donative entry laws would be abolished and all federal land would be sold at auction or similar sale device.

D. Probable Advantages

This would return to the federal government full value for any lands disposed of. It would end the possibility of some citizens obtaining federal land free or at a "subsidized" price. Making prospective users of the public domain pay full price for the land should curtail speculation and discourage or prevent the cultivation of public lands which ought not to be cultivated. This in turn could provide for better and more intensive use of private land.

F. Probable Disadvantages

Those unable to pay full value for federal land would no longer be able to obtain it. As much of the remaining federal land is marginal in value, the administrative cost of determining fair market value might exceed the amount received from such sales.

VARIATION TO ALTERNATIVE NO. 5

VARIATION-NO. 5-A

THE FEDERAL GOVERNMENT SHOULD DISPOSE OF THE AGRICULTURAL LAND AT FULL MARKET VALUE, BUT THE PATENT SHOULD CONTAIN A RESTRICTION LIMITING USE TO AGRICULTURAL PURPOSES.

A. Summary

This variation is the same as No. 5 except the patentees' use of the land would be restricted to agricultural purposes.

B. Purpose

The objective is the same as for No. 5 but this variation has the added objective of assuming that the land would continue to be used for agriculture.

C. Key Feature

The key feature is the same as for No. 5 except use restrictions, either perpetual or for a term, would be put in the patent with a reversionary clause.

D. Probable Advantages

This has the same advantages as No. 5, plus the added advantage of assuring the land will continue to be cultivated. Thus, land determined to be chiefly valuable for agricultural purposes would not be diverted into other uses.

E. Probable Disadvantages

Besides all the disadvantages of No. 5 this would have three others. First, the price the government would receive would be less because land with use restrictions is generally less valuable than land without them. Second, reversionary clauses are usually difficult to administer and the government could get the land back and have to resume management over it or dispose of it a second time. Third, changing conditions might later make the land more useful for other than agricultural purposes and it might then be in the public interest not to have its use restricted to agriculture.

VARIATION NO. 5-B

THE FEDERAL GOVERNMENT SHOULD RECEIVE FULL VALUE LESS A CERTAIN SUM PER ACRE IN RETURN FOR LAND DISPOSED OF FOR AGRICULTURAL USE.

A. Summary

This alternative differs from No. 5 in that patentees would be required to pay something less than full value for any land obtained for agricultural purposes.

B. Purpose

The objective is to provide a return to the government for any land disposed of which is related to fair market value, but at the same time to grant a subsidy or inducement to entrymen to encourage development of lands available for agricultural use.

C. Key Feature

In addition to meeting the other requirements of law, an entryman, to be entitled to a patent, would be required to pay the fair market value of the land less a specified amount per acre. Unlike No. 5, under this alternative the donative entry laws would not be abolished, but only modified.

D. Probable Advantages

This would return to the federal government a portion of the value of the lands disposed of. It would tend to discourage speculation. By granting the lands at less than full value it would offer an inducement for development of the lands. It would retain the other features of the agricultural land laws such as the requirements for cultivation, residence, etc., thus giving some assurance the land would be used for agricultural purposes.

E. Probable Disadvantages

It would grant public property to citizens at less than full value and therefore be a grant of property owned by all of the citizens to only some of the citizens. It would have essentially the same disadvantages as No. 5.

ALTERNATIVE NO. 6

The Classification Authority Delegated to the Secretary of the Interior by the Classification and Multiple Use Act of 1964 Should be Made Permanent

A. Summary

This proposal gives the Secretary of the Interior permanent authority to promulgate regulations containing criteria for classifying lands and to classify lands.

B. Purpose

The objective is to provide for permanent and continuous classification and reclassification of federal lands as required by changing conditions.

C. Key Feature

The key feature of this alternative would be to remove the interim or temporary status from the Classifications and Multiple Use Act of 1964 and make it a permanent statute.

D. Probable Advantages

This would permit continuous classification and reclassification of federal lands under criteria established under this Act. It would provide for continuity of the classification which the Secretary of the Interior has done since 1964 under the present statute.

E. Probable Disadvantages

The present laws give the Secretary extensive discretionary authority which is not subject to judicial review except in the case of fraud or an abuse of discretion. This would continue what may be a delegation of too much authority to the Secretary. The general views of Congress concerning the retention and disposal of the public domain may not always be followed by the Secretary in promulgating criteria and classifying lands.

ALTERNATIVE NO. 7

The Secretary of the Interior Should Not be Required to Accept Applications for Entry under the Agricultural Land Laws Except in Areas that he has First Designated as Open to the Filing of Such Applications

A. Summary

This proposal requires the Secretary of the Interior to designate an area as suitable for agricultural purposes before applications can be made for entry under the agricultural land laws.

B. Purpose

The objective is to prevent the filing of agricultural applications which have little or no chance of favorable action and to put an end to the government's need to process such futile applications. Another objective is to prevent the filing of applications for submarginal lands by persons whose interest in agriculture is transitory.

C. Key Feature

The key feature of this alternative would be to prohibit the Secretary from accepting agricultural applications except for lands that he had first designated as open to the filing of such applications.

D. Probable Advantages

This would prevent the wasteful expenditure of time and money in processing applications which have little or no chance of being approved. It would prevent attempts to cultivate lands not suitable for agricultural purposes. It would prevent entrymen from expending large sums of money on submarginal lands in an attempt to make them productive where there is little hope of success. It would prevent speculative endeavors by persons who may be tempted to use the agricultural land laws to obtain land which they intend ultimately to devote to another purpose.

E. Probable Disadvantages

It would make the Secretary of the Interior the judge of what lands are suitable for agriculture and in effect give him the authority to stop all use of the agricultural land laws. It would prevent entrymen who are willing to risk their time and money in an effort to develop now unproductive lands from doing so. Under this alternative a prospective entryman would have no way of compelling the Secretary to classify a tract of land. He does have such a right under Section 7 of the Taylor Grazing Act, which requires the Secretary to classify a tract of land whenever a qualified entryman files an application for entry.

ALTERNATIVE NO. 8

Corporations Should Be Permitted to Make Homestead and Desert Land Entries

A. Summary

This proposal permits corporations as well as individuals to make agricultural entries.

B. Purpose

The objective would be to give recognition to present agricultural practices. Today the corporate form of operation is becoming more and more prevalent in agriculture. For tax purposes and other reasons individuals often find it desirable to incorporate their farming operations. This alternative would eliminate discrimination against the corporate farmer.

C. Key Feature

The key feature would be to change the present laws to permit a corporation to qualify as an entryman. As to the homestead laws, this would have the effect of removing the residence requirements, at least for corporations.

D. Probable Advantages

This would prevent persons who presently farm or contemplate farming under corporate status from having to abandon that practice or resort to subterfuge in order to take advantage of agricultural land laws.

E. Probable Disadvantages

This might permit an individual or a small group of individuals to obtain large blocks of public domain in concentrated ownership through the use of numerous corporate entities all owned by the same person or persons. It clearly abandons the concept of encouraging the establishment of "family" farms. It would probably require the elimination of residence requirements in the homestead laws because corporations cannot meet such requirements.

ALTERNATIVE NO. 9

There Should be More Flexibility in Determining the Smallest Size Legal Subdivision Which may be Entered or Assigned

A. Summary

This proposal provides that under certain circumstances less than a quarter quarter section (40 acres) or fractional lot may be entered or assigned.

B. Purpose

The present practice of the Department of the Interior provides that the smallest size tract that an entryman can enter or assign is a quarter quarter section or fractional lot. This is called a "minimum legal subdivision". The objective of this alternative is to permit the entry or assignment of less than a minimum legal subdivision where physical conditions make this desirable.

C. Key Feature

The key feature would be a change in the present administrative practice so as to allow less than a legal subdivision to be entered or assigned when the physical characteristics of the land in question do not warrant entry or assignment of the entire legal subdivision.

D. Probable Advantages

This would provide the flexibility to cover numerous diverse situations. When a 40 acre parcel is traversed by a natural boundary, such as a river, this natural boundary is a logical dividing point for purposes of entry and assignment.

E. Probable Disadvantages

This alternative would require deviations from the standard system of survey developed by the Department of the Interior, and would, in some instances, require new surveys of meander lines and more complicated legal descriptions.

ALTERNATIVE NO. 10

The Cultivation Requirements in the Homestead Laws Should be Modernized

A. Summary

This proposal provides for a change in the cultivation requirements for homestead entries to reflect modern agricultural technology and economics.

B. Purpose

The objective is to reform the present obsolete cultivation requirements which require the entryman to cultivate only 1/16 of his entry during the second year after entry and 1/8 during the third year. As it is almost impossible today to establish an economic farm unit within the acreage limitations of the agricultural land laws, it is obvious that an entryman cannot possibly subsist on a farm of 160 or even 320 acres if he has only 1/8 of it under cultivation after three years of work. With modern machinery land can be prepared for cultivation much more quickly than was possible at the time the present obsolete cultivation requirements were first put into the law.

C. Key Feature

The key feature of this alternative would be to revise the cultivation requirements to reflect modern agricultural practices. The quantity of cultivation that should be required today would depend upon economic material developed by the resources portion of this study.

D. Probable Advantages

This would require homestead entrymen to proceed much more quickly in developing their land for cultivation. It would discourage speculators whose real intent is not to establish a permanent farm operation because it would require them to invest far more in agricultural development than they are now required to do. If it is desirable to have any of the remaining public domain put into agricultural production, this would tend to bring about this objective more quickly.

E. Probable Disadvantages

It would require an entryman to have more capital than at present and thereby possibly prevent some people from taking advantage of the present laws.

ALTERNATIVE NO. 11

Persons Owning More Than 160 Acres of Land Should Not Be Precluded From Making Homestead Entries Any More Than Those Owning Substantial Amounts of Other Types of Wealth

A. Summary

This proposal permits persons owning more than 160 acres to make homestead entries.

B. Purpose

The objective is to remove a restriction which discriminates against persons owning one type of wealth, namely land. At the present time if a person owns more than 160 acres of land he is prohibited from making an entry. However, another person with millions of dollars of corporate stock or cash is eligible to make a homestead entry.

C. Key Feature

The key feature would be to remove the present provision prohibiting persons owning more than 160 acres from making homestead entry. This would not change the maximum quantity of land a person could acquire from the federal government under all the land laws. It would simply make those who have acquired more than 160 acres from private sources eligible to obtain the same amount of homestead land as those who have no wealth or whose wealth is in assets other than land.

D. Probable Advantages

This would eliminate discrimination against one type of wealth. Also it would make the homestead laws consistent with the desert land entry laws wherein the amount of land owned is not a criterion in determining the eligibility of an entryman.

E. Probable Disadvantages

This might in some small way contribute to the concentration of land ownership. Also it would increase the number of eligible entrymen and thereby perhaps increase the demand for the small supply of available land.

ALTERNATIVE NO. 12

Desert Land Entries Based Upon Percolating Groundwater Should Be Permitted In All States Including Those Where Groundwater Is not Subject to Prior Appropriation

A. Summary

This proposal permits desert land entries based upon percolating groundwater regardless of whether the applicable state laws make groundwater subject to prior appropriation.

B. Purpose

The objective is to provide uniformity in the application of the desert land laws by permitting desert land entries based upon percolating groundwater in all states. The Department of the Interior presently interprets the desert land laws as requiring the entryman to have an appropriative water right. The Department concluded from this interpretation that in those states that do not permit appropriation of percolating groundwaters, desert land entries cannot be permitted based upon such percolating groundwater. This causes a different result under the desert land laws from one state to another in cases having identical factual situations.

C. Key Feature

The key feature of this alternative would be an amendment to 43 U.S.C. §321 which now provides that the right to the use of water to be used by the entryman in reclaiming the land "shall depend upon bona fide prior appropriation". The amendment would add after the word "appropriation" the words "or other basis of right recognized by state law".

D. Probable Advantages

This would provide for uniform interpretation of desert land entry applications based on percolating groundwaters.

E. Probable Disadvantages

This would open lands in some water short states to desert land entries and possibly provide for further demands on already overtaxed water supplies.

ALTERNATIVE NO. 13

Applicants for Desert Land Entries Should not be Required to Show Economic Feasibility Before Being Allowed to Enter Public Land

A. Summary

This proposal provides that an advance showing of economic feasibility would not be required of prospective desert land entrymen.

B. Purpose

At the present time the Bureau of Land Management's policies require an entryman to show his ability to finance the required development of the land and that farming the land is economically feasible before his application for entry will be approved. The purpose of this alternative is to permit prospective entrymen who want to risk their time and capital to make an entry without having to first demonstrate such feasibility.

C. Key Feature

The Department of the Interior would be prohibited from requiring any advance showing of economic feasibility as a criterion for the approval of an application to make a desert land entry.

D. Probable Advantages

This would remove present bureaucratic determinations of economic feasibility and in place thereof would let the entryman be the judge of whether he wants to risk his time and capital. If his judgment is wrong and he fails to reclaim the land, it will be his loss and he will not be given a patent. This will substitute the entrepreneur's judgment of feasibility for that of government employees who may have had no personal experience in developing a farm. This should encourage more persons to attempt to reclaim land that is now unproductive.

E. Probable Disadvantages

This would probably result in entrymen attempting to cultivate land which should not be put into cultivation. Such action could result in the destruction of grazing lands and cause erosion with no offsetting benefits to anyone. Individuals should not be allowed to inflict such damage upon the public domain regardless of their willingness to risk their own resources.

In Classifying Land the Secretary of the Interior
Should be Prohibited from Making any Determinations
of Water Rights

A. Summary

This proposal precludes the Secretary of the Interior from making any determinations of water rights when classifying land as to its suitability for agricultural use.

B. Purpose

Applicants have contended that in classifying land the Secretary of the Interior has attempted to determine water rights, which is a matter that should be left solely to the jurisdiction of the states. The purpose of this alternative is to make clear by statute that the Secretary of the Interior has no authority whatsoever to make any determinations of water rights in classifying lands.

C. Key Feature

By statute Congress would direct that in making land classifications the Secretary of the Interior is to give no consideration and make no determinations concerning an applicant's right to the use of water.

D. Probable Advantages

This would clarify Congressional intent that water rights determinations are matters to be left solely to the states. It would eliminate the present practice of dual interpretation of water rights by both the State and the Federal Government.

E. Probable Disadvantages

One of the factors that determines the suitability of land for agricultural use is the presence or absence of water and a person's right to use such water. If the Secretary is prohibited from considering an applicant's right to water, he will not be able to make an intelligent classification of the land.

The Present Distinction Between Mortgaging
Desert Land Entries in States Recognizing
the Lien Theory of Mortgages and States
Recognizing the Title Theory of Mortgages
Should Be Abolished

A. Summary

This proposal permits mortgaging desert land entries in states which recognize the title theory of mortgages.

B. Purpose

The objective is to provide uniformity in the application of the desert land laws by permitting mortgaging of desert land entries both in states which recognize the lien theory of mortgages and in those which recognize the title theory of mortgages. The Department of the Interior presently forbids mortgaging desert land entries in states recognizing the title theory of mortgages. The Department's position is based on the proposition that such a mortgage passes title to the entry and therefore is an invalid assignment or conveyance. This causes a different result under the desert land laws from one state to another even though the factual situation is the same in both cases.

C. Key Feature

The key feature of this alternative is to permit mortgaging of desert land entries in all states.

D. Probable Advantages

This would provide for uniform administration of desert land entries in all states based upon the practical effect of the transaction without regard to legal theory.

E. Probable Disadvantages

None apparent.

The Laws and Regulations Governing the Right of
Entrymen to Lease Desert Land Entries and Have
Someone Else Carry Out the Requirements of Final
Proof Should be Clarified

A. Summary

This proposal requires that the laws and regulations pertaining to the leasing of desert land entries be clarified so that entrymen will know under what terms their entries may be leased without jeopardy of having their entries revoked.

B. Purpose

At the present time the administrative regulations are unclear as to: (1) the extent to which expenditures made by one other than the entryman will be considered as a part of the expenditures required by the desert land laws, and (2) whether the entryman can enter into a lease which would require the lessee to fulfill all prerequisites to successful final proof. Under present laws it is clear that the entryman may hire others to perform the necessary reclamation of his entry, but his right to assign his entry is limited. The objective of this alternative is to define the line between an illegal assignment and a permissible lease or contract for work to be performed on the entry.

C. Key Feature

The laws and regulations should be changed to clearly state the terms under which an entryman can lease his entry without jeopardizing his right to obtain a patent.

D. Probable Advantages

This proposal would enable entrymen to know what terms they can incorporate into their leases with reasonable assurance that at a later date the lease will not be deemed to be an illegal assignment thereby voiding their entries.

E. Probable Disadvantages

The only disadvantage is that specifying the terms upon which entries may be leased might make the law more rigid than it now is and thereby deprive the Department of the Interior of some administrative flexibility.

Reclamation Homestead Entryman Should Be
Required to Submit Final Reclamation Proof
Without Unreasonable Delay

A. Summary

This proposal provides that the delivery of water to the lands of any reclamation homestead entryman who fails to submit final reclamation proof within five years of the date of the acceptance of his final homestead proof could be discontinued.

B. Purpose

The objective is to promote more efficient administration of the reclamation homestead laws by encouraging expeditious completion of long outstanding reclamation entries.

C. Key Feature

The Commissioner of Reclamation would be given the power to suspend water deliveries to reclamation homestead entries when reclamation proof is not filed within five years after final homestead proof. If homestead proof has been made prior to the adoption of this alternative, one year's notice of the expiration of the five year period would be required. The Commissioner of Reclamation would be given equitable powers to extend the five year period upon a showing of impossibility of hardship.

D. Probable Advantages

There are numerous pre 1914 unperfected reclamation homestead entries in existence to which the time limits of 43 U.S.C. 440 do not apply. This alternative should enable the government to close its files on these outstanding entries. Determinations, such as the existence or non-existence of minerals, are made at the time of final proof. By insuring that final proof will be expeditiously sought, such determinations will not be indefinitely postponed.

There are also some post 1914 entries which have complied with the Section 440 requirements, but have still not filed final proof, perhaps because they have been avoiding local taxation through oversight on the part of local taxing officials. These entrymen would also be induced to promptly file final proof.

E. Probable Disadvantages

The only apparent disadvantages are that some entrymen may have their water cut off and some may have their property put on the local tax rolls if they have been avoiding taxation because title was still legally in the United States.

ALTERNATIVE NO. 18

The Secretary of the Interior Should Be Allowed to Sell Lands Which Have Been Included in Homestead or Desert Land Entries to the Highest Bidder Whenever the Secretary Determines that there is no Reasonable Prospect that the Entryman Will Be Able to Effect Final Proof and in Any Such Sale Where the Entryman is the Highest Bidder He Should Be Allowed to Apply the Value of Any Improvements He Has Made Toward the Purchase Price

A. Summary

This proposal permits the Secretary to sell to the entryman or others, lands that have been entered under either the homestead or desert land laws whenever it becomes apparent that there is no reasonable prospect that the entryman will ever be able to perfect his entry to a patent.

B. Purpose

The purpose of this alternative is to provide an equitable solution to certain situations where the existing laws do not permit any relief to be granted.

C. Key Feature

In those situations where the Secretary of the Interior is satisfied that there is no reasonable prospect that the entryman will be able to meet the final proof requirements, through no fault of his own, the entryman would be permitted to apply to the Secretary for a reclassification of the use to which the land would be put. If the Secretary reclassifies the land, he may sell it to the highest bidder and if the entryman is the highest bidder, he will be entitled to purchase the land at his bid price minus the value of any improvements which he made in attempting to perfect a patent. The Secretary will determine the value of such improvements as of the time the Secretary becomes satisfied that the entryman will not be able to complete final proof.

D. Probable Advantages

This would permit the possibility of some relief to an entryman who in good faith expended considerable sums of money in making improvements on public lands but for one reason or another fails to qualify for a patent.

E. Probable Disadvantages

The presence of such a law might lessen an entryman's incentive to complete the necessary work for a patent, at least in those situations where the entryman thought there was a reasonable chance he could acquire it by purchase for less expense than by completing the work to obtain a patent.

VARIATIONS TO ALTERNATIVE NO. 18

VARIATION NO. 18-A

THE ENTRYMAN SHOULD BE ALLOWED TO PURCHASE THE LAND BY MEETING THE HIGHEST BID.

A. Summary

This variation allows the entryman the opportunity of meeting the highest bid. He would not have to become a bidder. The probable advantages and disadvantages are essentially the same as those of Alternative No. 18 except this variation gives the entryman a bit more of a preference. This might be a slight deterrent to bidding and thereby result in a lesser price being paid to the government for the land.

VARIATION NO. 18-B

IF SOMEONE OTHER THAN THE ENTRYMAN ACQUIRES THE LAND THE SECRETARY SHALL COMPENSATE THE ENTRYMAN FROM THE PURCHASE PRICE FOR THE VALUE ADDED TO THE LAND BY THE ENTRYMAN OR HIS PREDECESSOR IN INTEREST.

A. Summary

This variation goes further in granting relief to the entryman in that he will be compensated for any value he has added to the land if it is purchased by another. The type of value for which he would be compensated are improvements to the land such as disking, harrowing, etc. This variation has the added advantage to the entryman of assuring him of compensation in certain instances. It has the disadvantage to the government of giving it a lesser net return on the sale price.

VARIATION NO. 18-C

IF SOMEONE OTHER THAN THE ENTRYMAN ACQUIRES THE LAND THE ENTRYMAN, WITH THE CONSENT OF THE SECRETARY OF THE INTERIOR, MAY REMOVE, OR SELL TO THE PERSON ACQUIRING THE LAND, THE IMPROVEMENTS HE HAS MADE WHICH CAN BE REMOVED WITHOUT SUBSTANTIAL INJURY TO THE LAND AND WHICH WERE NOT INCLUDED IN THE APPRAISAL PRICE OF THE LAND.

A. Summary

This variation is another form of added relief to the entryman who has put improvements on the land. It has the same advantages and disadvantages as Alternative No. 18. Also, it allows the entryman to recover some of his improvements. It may result in a lower purchase price being received by the government than would be the case if the entryman could not remove the property.

REFERENCES FOR ALTERNATIVES

The references for each alternative are listed below. The reference to comments from Commission meetings refers to the meetings of February 14, 15, 17 and 18, 1967, in Fresno and Palm Springs, California; September, 1967, in Washington and Idaho; October 6 and 7, 1967 in Milwaukee, Wisconsin, and January 11, 12 and 13, 1968, in Washington, D.C. The reference to the "Idaho Brochure" refers to the material prepared for the Commission by the State of Idaho presented by Robert J. O'Connor and dated September 5, 1967.

For some of the alternatives no references are shown. These alternatives evolved from our review of the existing legal system.

Alternative No.

References

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| 1 | Comments from Commission meetings; Memorandum from Lands Staff Officer to the Director of BLM dated March 7, 1961. Subject of memo was Lands Legislative Program. Outright repeal of homestead and desert land laws was suggested as an alternative on page 2 of the memo. Also, the Secretary of the Interior has referred to the obsolescence of the agricultural land laws. See BLM release of April 10, 1962 on modernization of agricultural land laws. |
| 1-A | None, other than those for Alternative No. 1. |
| 2 | Same as Alternative No. 1. |
| 3 | BLM proposed legislation dated 1962. A bill was prepared but apparently never submitted for introduction. |
| 4 | Comments from Commission meetings. Also, the first draft of resources portion of this study. |
| 4-A | Same as Alternative No. 4, plus Section 3 of the Reclamation Act (43 U.S.C. 434) which gives the Secretary authority to establish farm sizes, up to a maximum limit set by Congress. |

Alternative No.

References

- 5 Land Conservation Policies of the Department of the Interior with Respect to Land Classification and Disposition by the Bureau of Land Management. BLM Manual, Vol. V Lands, Part 1 General, Chap. 1.20, Appendix III. These policies state that the government should receive a full return for its property.
- 5-A None.
- 5-B H.R. 11822, 87th Congress, by Mr. Aspinall; S. 3181, 87th Congress, by Mr. Bible; BLM proposed legislation dated 1962.
- 6 No specific references. Department of the Interior Associate Solicitor's opinion of June 19, 1967, holds that certain effects of the Classification and Multiple Use Act of 1964 continue indefinitely, but the authority to classify is temporary.
- 7 Same as Alternative No. 5-B, plus BLM release of April 10, 1962, mentioned in reference to Alternative No. 1.
- 8 None.
- 9 Comments from Commission meetings and Idaho brochure.
- 10 None.
- 11 None.
- 12 Idaho brochure, Department of the Interior Solicitor's opinion M-36263 and Act of Aug. 4, 1955, PL 84-226, 69 Stat. 491.
13. Comments from Commission meetings and Idaho brochure.
14. Comments from Commission meetings and Idaho brochure.
15. Comments from Commission meetings and Idaho brochure.

Alternative No.

Reference

- 16 Comments from Commission meetings,
Idaho brochure and "Indian Hill"
cases (U.S. vs. Shearman, et al.,
Idaho 013911 and 013912; U. S. vs. Michener,
et al., Idaho 012234 - 41-42-43 and 49;
In the Matter of Reed, et al., Idaho
012235 - 42-43-44 and 99.).
- 17 S. 1817, 86th Congress, by Mr. Murray;
BLM proposed legislation dated 1962.
- 18 H.R. 4195, 88th Congress, by Mr. Rhodes.
- 18-A Same as Alternative No. 18 and S. 1058,
90th Congress by Mr. Gruening.
- 18-B Same as Alternative 18-A.
- 18-C Same as Alternative 18-A.

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